the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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The Southern New England Telephone Company	)	
	)	W.C. Docket No. 04-30
Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company to Unbundle Its Hybrid Fiber Coaxial Facilities	)	

REPLY COMMENTS OF SBC CONNECTICUT

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REPLY COMMENTS OF SBC CONNECTICUT

Introduction and Summary

The Southern New England Telephone Company ("SBC Connecticut") respectfully submits these reply comments in support of its Emergency Request Petition for Declaratory Ruling and Preemption ("Petition") preempting a decision of the Connecticut Department of Public Utility Control's ("DPUC" or "Department") that directed SBC Connecticut to unbundle its hybrid fiber coaxial ("HFC") facilities.

In its Petition, SBC Connecticut demonstrated that the DPUC's *Final Decision*[1] is inconsistent with the federal Telecommunications Act of 1996 ("1996 Act") and this Commission's implementing regulations. Not only does the *Final Decision* force SBC Connecticut to spend millions of dollars to subsidize the business plan of a single competitor, but it ignores this Commission's express determination that, as a matter of federal law and policy,

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[1] Final Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Dec. 17, 2003) ("*Final Decision*") (attached as Exhibit A to the Petition).

broadband facilities should not be subject to unbundling. The DPUC's *Final Decision* frustrates this critical federal policy.

In the *Triennial Review Order*,[2] this Commission held that any application of the section 251(c)(3) unbundling requirements to broadband facilities "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706." 18 FCC Rcd at 17149, ¶ 288. The Commission rejected any unbundling of next-generation facilities, concluding that the absence of unbundling would encourage CLEC "deployment of their own facilities necessary for providing broadband services to the mass market." *Id.* at 17150, ¶ 290. The United States Court of Appeals for the District of Columbia Circuit expressly upheld this Commission's articulation of federal law and policy in *USTA II*. Because the DPUC's *Final Decision* compels SBC Connecticut to unbundle next-generation facilities, notwithstanding the fact that this Commission has specifically exempted those facilities from any obligations, it directly conflicts with the policy judgment that Congress assigned to this Commission. *See USTA II*, 2004 WL 374262 at *11, 8 (section 251(d)(2) constitutes an express "conferral of regulatory authority" to the FCC "to 'determine[]' which network elements shall be made available to CLECs on an unbundled basis"). The DPUC's *Final Decision* is therefore preempted as a matter of federal law.

Likewise, although the DPUC itself held that the subject HFC facilities are "equivalent" to the hybrid copper-fiber facilities that this Commission considered in the *Triennial Review Order*, the DPUC nevertheless ordered SBC Connecticut to unbundle its HFC facilities even

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Association v. FCC*, No. 00-1012, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

where SBC Connecticut offered unbundled access to a narrowband transmission path. That, too, contravenes this Commission's clear implementation of the federal unbundling regime.

The DPUC's *Final Decision* is also inconsistent with federal law for each of the following reasons. *First*, the DPUC ignored the unbundling regime established by the *Triennial Review Order*, as evidenced by its continued reliance in its comments upon the unbundling standards articulated in the *Local Competition Order*[3] and the *UNE Remand Order*,[4] each of which had been vacated long before the proceedings before the underlying proceedings. *Second*, the Department focused exclusively on the business plan of Gemini Networks CT, Inc. ("Gemini"), refusing to consider whether carriers faced competitive impairment in the absence of unbundling. Likewise, the Department refused to consider the availability of other UNEs – including local loop and subloop facilities – as required by the *Triennial Review Order*. Indeed, in light of the recent *USTA II* decision, the Department was bound to consider the availability of incumbent tariffed and resold services as well. *See generally USTA II*. *Third*, because it is undisputed that carriers such as Gemini can provide narrowband voice service through existing UNEs, the DPUC could not require the unbundling of SBC Connecticut's HFC facilities consistent with federal law. *Fourth*, the DPUC ignored this Commission's interpretation of the term "network element," ordering the unbundling of facilities that do not meet the statutory standard. And, finally, the DPUC required SBC Connecticut to undertake a massive effort to reconstruct its network, notwithstanding the fact that SBC Connecticut would never undertake such extraordinary measures for any customer.

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*") (*subsequent history omitted*).

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 123 S. Ct. 1571 (2003).

In response to SBC Connecticut's clear showing that the Department's *Final Decision* both violates federal law and undermines the federal unbundling regime, a handful of commenters have done little more than mischaracterize the proceedings before the DPUC. Gemini, for example, contends that the DPUC "treated Gemini's request to unbundle the HFC network as a request for unbundled access to local loops," even though the *Final Decision* contains no such statement. *See* Gemini Comments at 8; *see also* AT&T Comments at 5, 9. Indeed, because the coaxial facilities are neither connected to any SBC Connecticut distribution frame (or its equivalent) nor to any end user customer premises, they do not meet the definition of local loop at all. *See* 47 C.F.R. § 51.319(a). Covad, by contrast, contends that the DPUC merely ordered open access to cable facilities, notwithstanding the DPUC's clear statement that it was acting pursuant to authority under section 251 of the 1996 Act and requiring the unbundling of telecommunications facilities. Meanwhile, the DPUC and the Connecticut Office of Consumer Counsel focus almost exclusively on obligations that SBC Connecticut might have had if it had replaced its existing network with the parallel HFC facilities, as it once had planned. But their counterfactual theorizing is completely irrelevant, as technological and economic forces precluded SBC Connecticut (and numerous other carriers) from deploying a functional HFC network and replacing its telecommunications network. SBC Connecticut never offered telecommunications services over the subject HFC facilities, and those facilities are not readily capable of being used to carry telecommunications services. Those facts remain undisputed.

Ultimately, the broader question presented by these proceedings is whether, consistent with federal law, the DPUC can force SBC Connecticut to spend millions of dollars subsidizing the market entry of a single competitor. SBC Connecticut offered to sell the subject coaxial facilities to Gemini at a market rate, but Gemini refused. Instead, Gemini petitioned the DPUC

for an order directing that SBC Connecticut give the subject facilities to Gemini for free – Gemini claimed that their forward-looking cost was zero.[5] Nothing in federal law sanctions such a result. Indeed, at every step in the analysis, federal law prohibits the conclusion drawn by the DPUC. To prevent the Department from thwarting the federal unbundling regime, the Commission should grant SBC Connecticut's Petition, declare the Department's *Final Decision* to be inconsistent with federal law, and exercise the Commission's authority to preempt that decision. The Commission indicated in its *Triennial Review Order* that it would not hesitate to exercise this authority where, as here, a state commission determination directly threatens the supremacy of federal law.

Background

Since several commenters have misstated the relevant facts, some additional background is necessary to clarify the record.

I. Factual Background

In approximately 1994, SBC Connecticut announced a broad plan to overhaul its legacy network. This blueprint – which included, among other things, replacing all of SBC Connecticut's analog switches with digital switches, upgrading SBC Connecticut's existing digital switches, and deploying both a SONET inter-office transport system and thousands of miles of inter-office fiber – was labeled the I-SNET Technology Plan. Critically, SBC Connecticut's anticipated deployment of an overlay, HFC network constituted only a portion of that plan.

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[5] *See, e.g.*, Written Exceptions of Gemini Networks CT, Inc., *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02, at 9 (DPUC filed Nov. 26, 2003) (attached hereto as Exhibit B).

In 1995, SBC Connecticut began deployment of an HFC network parallel to, but separate and distinct from, its legacy copper network. As SBC Connecticut explained in its Petition, it originally designed the HFC network to support a full suite of telecommunications, data, and video services, and that it hoped would replace its legacy network. But despite its early promise, the HFC technology failed to develop as originally anticipated. After numerous other telecommunications carriers and then SBC Connecticut's primary supplier withdrew from the HFC marketplace, SBC Connecticut determined that the HFC facilities did not offer a technologically feasible and economically viable platform for carrying telecommunications services.[6] In light of these external market forces, and because SNET Personal Vision, Inc. ("SPV") could not support the cost of the HFC build-out through the provision of cable television services, SBC Connecticut and SPV sought and received permission to cease deploying the HFC facilities and to abandon their plan to offer voice, data, and video services over the HFC network.[7]

SBC Connecticut never utilized the coaxial facilities to offer telecommunications services. While the Department correctly notes that SBC Connecticut successfully conducted a small *trial* of HFC-based telephony during the fall of 1995, *see* DPUC Comments at 6, SBC Connecticut never offered HFC-based telephony to the general public, even in the areas where SBC Connecticut had deployed the HFC facilities. Because the 1996 Act defines a

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[6] At the time, SBC Connecticut had deployed approximately 4,000 miles of HFC facilities. Its original HFC plan, by contrast, contemplated the deployment of 200,000 miles of HFC facilities.

[7] *See* Decision, *Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity*, Docket No. 00-08-14 (DPUC Mar. 14, 2001) ("*Franchise Relinquishment Decision*"), available at http://www.dpuc.state.ct.us/FINALDEC.NSF/2b40c6ef76b67c438525644800692943/85e222fd9a4444d885256a0f006ee01d?OpenDocument&Highlight=0,00-08-14; Decision, *Application of SNET Personal Vision, Inc. to Modify Franchise Agreement*, Docket No. 99-04-02 (DPUC Aug. 25, 1999), available at http://www.dpuc.state.ct.us/dockhist.nsf/22af672892a9d75b85256afe0059fc24/43d46b17f6ea0a0c852568410049cb39?OpenDocument&Highlight=0,99-04-02.

"telecommunications service" as the offering of telecommunications to the public for a fee, 47 U.S.C. § 153(46), and because SBC Connecticut never sold the HFC-based telephony to the general public on a common carrier basis, it necessarily follows that SBC Connecticut never offered telecommunications services over the subject HFC facilities.

Other than this solitary HFC-based telephony trial, SBC Connecticut has never utilized any of the coaxial facilities that the DPUC ordered SBC Connecticut to unbundle. SBC Connecticut did, however, lease the coaxial portion of the HFC network to SPV for use in providing cable television service.

The Department contends that it had previously required SBC Connecticut to make its HFC facilities available to requesting entities. *See* DPUC Comments at 7. But the DPUC mischaracterizes its *Franchise Relinquishment Decision*, and improperly confuses the facilities that it has ordered SBC Connecticut to unbundle with different components of the video architecture. In granting SPV's request to relinquish its Certificate of Public Convenience and Necessity, the Department did not, as it now contends, "require[]" SBC Connecticut to make its HFC facilities available to third parties. Rather, the DPUC simply noted that SBC Connecticut was *continuing* to make certain transport facilities available pursuant to a federal tariff. *See Franchise Relinquishment Decision* at 31. Nothing in the *Franchise Relinquishment Decision* affected the services that SBC Connecticut offered pursuant to that FCC tariff.

The *Franchise Relinquishment Decision* additionally recognized that the coaxial facilities that the Department has now ordered SBC Connecticut to unbundle were neither used for, nor useful in, providing telecommunications. Specifically, the "Department [] determined that, under alternative regulation, the cost of the investment in the HFC network that is *not used and useful* is a below-the-line cost that must be borne by shareholders." *Id.* at 18 (emphasis added).

As ordered by the DPUC, *all* of the coaxial facilities were removed from the Gross Plant, Property, and Equipment on SBC Connecticut's regulated books, and SBC Connecticut's shareholders bore the attendant losses. Indeed, SBC Connecticut ultimately wrote off hundreds of millions of dollars associated with its investment in the HFC facilities.[8] These massive write-offs alone demonstrate that SBC Connecticut's shareholders, not its ratepayers, funded the construction of the separate HFC network.[9] Gemini's contention that SBC Connecticut's coaxial facilities were "funded in large part by telephone company ratepayers" is false. Gemini Comments at 6.

Whenever SBC Connecticut could make use of portions of the HFC facilities to provide telecommunications services, it has done so. Indeed, acting under the supervision of FCC auditors, who approved SBC Connecticut's cost-causative accounting treatment under this Commission's *Accounting Safeguards Order*,[10] SBC Connecticut maintained all of the fiber facilities on its regulatory books. Taken together, the fiber facilities constituted 15 percent of the overall cost of the HFC deployment. *See Franchise Relinquishment Decision* at 15. That fiber has been and remains available on an unbundled basis to any requesting carrier, in accordance with SBC Connecticut's obligations under section 251(c)(3) of the 1996 Act and this Commission's implementing decisions. *See* Petition at 6. Accordingly, SBC Connecticut

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[8] *See* SBC Communications, Inc. 10-K, note 2 to Consolidated Financial Statements (SEC filed Mar. 12, 1999).

[9] Indeed, because SBC Connecticut does not operate under rate of return regulation, it does not even possess "ratepayers." Rather, SBC Connecticut has operated under alternative, rate cap regulation since 1997. *See* Decision, *Application of The Southern New England Tel. Co. for Financial Review and Proposed Framework for Alternative Regulation*, Docket No. 95-03-01 (Mar. 13, 1996), available at http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/1f310b1ebde668c7852562ec006e62e9?OpenDocument&Highlight=0,95-03-01.

[10] Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17539 (1996) ("*Accounting Safeguards Order*").

continues to offer on an unbundled basis every piece of the HFC network that the Department deemed used or useful in providing telecommunications services.[11] Gemini has not, however, sought access to these fiber facilities. Rather, Gemini has only sought, and the DPUC's *Final Decision* only addresses, the coaxial facilities that were found to be neither used nor useful in the provision of telecommunications, and that SBC Connecticut removed from its regulatory books at a huge shareholder loss.

II. Procedural Background

As SBC Connecticut demonstrated in its Petition, the proceedings before the DPUC represent the antithesis of reasoned decision-making required by law. Indeed, the DPUC evidently reached a pre-determined conclusion, and then worked backwards in an attempt to justify that final result. At each stage of its "analysis," the DPUC announced its pre-ordained conclusion before bothering to consider the legal and mixed questions that were a prerequisite to any unbundling order.

For example, after purporting to find that the subject coaxial facilities satisfied the statutory definition of a network element, the DPUC jumped directly to the conclusion that those facilities had to be unbundled. *See Draft Decision*[12] at 36; *Final Decision* at 36 ("the HFC network meets the definition of a 'network element,' *and therefore it must be unbundled.*") (emphasis added). The DPUC reached its conclusion without ever considering any of the

[11] MCI's claim that "some of the HFC plant is still being used to provide telephony services" improperly conflates these fiber facilities, which SBC Connecticut makes available on an unbundled basis, with the coaxial facilities that were the subject of the DPUC's *Final Decision*. MCI Comments at 10-11. SBC Connecticut has never used the coaxial facilities to provide a telecommunications service.

[12] Draft Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Nov. 3, 2003) ("*Draft Decision*") (attached hereto as Exhibit A).

statutory factors that are prerequisite to unbundling. Several other portions of the DPUC's decision underscore the illegitimacy of its unbundling decision.

- In one of the closing sections of its *Draft Decision*, the DPUC stated that "given the *uncertainty* of the *HFC network elements that must be unbundled*, the Department believes that further clarification on the part of Gemini is necessary." *Id.* at 44 (emphases added). The DPUC never explained how, in light of this uncertainty over the actual subject of its decision, the DPUC could conclude that the undefined "elements" met the definition of a network element. Nor did the DPUC explain how it could find that carriers would be impaired in the absence of some undefined network elements, let alone how the unbundling of such unidentified facilities could be technically feasible. In other words, the DPUC ordered SBC Connecticut to unbundle its HFC facilities even though the Department had not concluded – and, until it identified specific elements that were the subject of its legal analysis, the Department could not conclude – that any particular element of SBC Connecticut's HFC network satisfied the requirements for unbundling.

- In both its *Draft Decision* and its *Final Decision*, for example, the DPUC consistently ignored its prior determination, in the *Franchise Relinquishment Decision,* that the coaxial facilities sought by Gemini were neither used nor useful for the provision of telecommunications. The DPUC did not even attempt to distinguish its earlier holding.

- In both its *Draft Decision* and its *Final Decision*, the DPUC asserted that the HFC facilities must be unbundled because they appeared similar to the hybrid loops addressed in the *Triennial Review Order*. Although this Commission has held that incumbent carriers *were not required* to unbundle hybrid loops so long as they offer a copper loop alternative, *see Triennial Review Order*, 18 FCC Rcd at 17153-54, ¶296, the DPUC inexplicably asserted that "the FCC has required" that "hybrid loop components . . . be unbundled," *Draft Decision* at 37.

- In considering whether carriers would be impaired in their ability to provide telecommunication services, the DPUC's *Draft Decision* applied the test for impairment that this Commission had articulated in the *UNE Remand Order* but that had been vacated by the D.C. Circuit and then repudiated by this Commission in the *Triennial Review Order*. The DPUC reasoned that the FCC had found impairment when "lack of access to [an] element diminishes a requesting carriers ability to provide the services it seeks to offer." *Draft Decision* at 40-41 (citing *UNE Remand Order*, 15 FCC Rcd at 3725, ¶ 51). Applying this standard, the DPUC concluded that "Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network," *id.* at 41, and that SBC Connecticut's "imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business," *id.* at 41-42. When SBC Connecticut, in its written exceptions, pointed out the DPUC's improper reliance on the *UNE Remand Order's* impairment standard, the DPUC did not alter its analysis whatsoever. Rather, it simply substituted cites to the *Triennial Review Order* for its prior cites to both the *UNE Remand Order* and the *Local Competition Order.*

- In its *Final Decision*, the DPUC did not even attempt to determine whether it would be technically feasible for SBC Connecticut to offer its coaxial facilities on an unbundled, non-discriminatory basis, as explicitly required under Connecticut state law. *See* Connecticut General Statute § 16-247b(a). Rather, having deprived SBC Connecticut of the opportunity to develop and introduce evidence concerning technical feasibility, and after purporting to consign that question to the second phase of the proceedings, the DPUC simply skipped that necessary part of its analysis altogether.

In light of these, and other similar defects, this Commission cannot and should not credit the DPUC's claim that its *Final* Decision "reflects a reasoned decision-making process." DPUC Comments at 24.

Discussion

I. The DPUC's *Final Decision* Directly Conflicts with the *Triennial Review Order*

As the federal courts have recognized, the unbundling provisions of the 1996 Act require a balancing of competing interests. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*") (recognizing that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities," while, at the same time, acknowledging that "a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful") (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part)). Congress assigned this task directly to the FCC and, as the *USTA II* Court just held, Congress precluded the FCC from sharing that authority. Under these circumstances, any attempt by any public or private entity to perform this statutory balancing must necessarily thwart both congressional intent and this Commission's unbundling authority. The Commission should preempt the DPUC's *Final Decision* on that basis alone.

The DPUC's *Final Decision* also contravenes at least two of this Commission's express unbundling determinations, and therefore stands as a clear obstacle to the attainment of federal

objectives. As the Commission recognized in the *Triennial Review Order*, under "longstanding federal preemption principles . . . , states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order." 18 FCC Rcd at 17099-100, ¶ 192.

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).

Id. at 17101, ¶ 195. Because the DPUC has ordered SBC Connecticut to unbundle facilities that this Commission specifically exempted from any unbundling obligations, the DPUC's *Final Decision* must give way to the supremacy of federal law.

A. The Final Decision Unlawfully Requires SBC Connecticut To Unbundle Next-Generation Broadband Facilities

In the *Triennial Review Order*, the Commission drew a sharp distinction in its mass market analysis between legacy copper facilities, which were made subject to unbundling, and non-copper, next-generation broadband facilities, which were not. As the Commission explained, its unbundling rules ensured that "requesting carriers have access to the copper transmission facilities they need in order to provide narrowband or broadband services (or both) to customers served by copper local loops." *Id.* at 17129-30, ¶ 250; *see also id.* at 17131-32, ¶ 253 (requiring unbundled access to copper subloops). Indeed, the Commission clearly held that copper loops and TDM-based DS1 and DS3 loops constituted the only broadband-capable facilities to which incumbents must provide unbundled access.[13] By contrast, the Commission

[13] SBC Connecticut has not argued that CLECs cannot obtain unbundled access to any broadband-capable facility, as Covad Communications falsely contends. *See* Covad Comments at 8-10. Rather, the Commission narrowly cabined this right to copper loops, copper sub-loops, and TDM-based DS1 and DS3 loops. *See Triennial Review*

"decline[d] to attach unbundling requirements" to "next-generation networks," concluding that the absence of unbundling will best promote investment in and deployment of broadband facilities. *Id.* at 17141-42, ¶ 272; *see also id.* at 17148, ¶ 286 ("reliev[ing] incumbent LECs of unbundling requirements for the next-generation network capabilities of their hybrid loops"); *id.* at 17153, ¶ 295 ("we conclude that it is consistent with our section 706 mandate to promote investment in infrastructure by refraining from unbundling incumbent LECs' nextgeneration network facilities and equipment"). With respect to both "fiber to the home" ("FTTH") and "hybrid" loops, the Commission found that competing carriers are not impaired without unbundled access to those facilities. *See id.* at 17142, ¶ 273 (FTTH); *id.* at 17148, ¶286 (hybrid loops).

The DPUC's *Final Decision*, which requires SBC Connecticut to unbundle its HFC facilities, directly conflicts with this Commission's determination. SBC Connecticut's HFC facilities are clearly next-generation facilities. In describing FTTH facilities, this Commission noted that they will support "voice, data, video, and other services." *Id.* at 17142-43, ¶ 274. Indeed, the Commission found that carriers would not be impaired in the absence of unbundling because the "revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops. Besides providing narrowband services like voice, fax, and dial-up Internet access, competitive LECs could also deploy a wide-array of video and other broadband applications over such FTTH loops." *Id.* at 17144, ¶ 276. Those are precisely the terms that the DPUC utilized to describe SBC Connecticut's HFC facilities: they

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Order, 18 FCC Rcd at 17151, ¶ 291. The coaxial facilities that are the subject of SBC Connecticut's Petition are not a species of copper loops, and therefore fall within the Commission's general decision not to require the unbundling of broadband facilities. The fact that Gemini has "committed" to provide narrowband services (*see* DPUC Comments at 18) is irrelevant to the question of whether it can obtain unbundled access to these next generation HFC facilities. Under the *Triennial Review Order*, it cannot.

were "constructed in part and intended by the Company to provide a full complement of voice, data and video services."[14] *Final Decision* at 36.

This Commission confronted the specific question at issue in the DPUC proceedings and expressly declined to unbundle next-generation facilities for use in providing broadband services.[15] The Commission precluded competitive carriers from obtaining access to any FTTH facilities on an unbundled basis, and refused to unbundle any "broadband features, functions, and capabilities of hybrid loops." *Triennial Review Order*, 18 FCC Rcd at 17151, ¶ 291. In choosing to "tailor [] unbundling requirements to most effectively address those services that are not yet fully subject to competition (*i.e.*, narrowband services in the mass market) rather than the broadband services that are currently provided in a competitive environment," *id.* at 17151-52, ¶ 292, the Commission held that incumbent carriers need only provide access either to legacy copper facilities or to a narrowband voice transmission path.[16] The D.C. Circuit upheld each of these determinations in its recent *USTA II* decision.

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[14] The DPUC also described the cost of deploying new coaxial facilities as a barrier to entry that justified unbundling. *See Final Decision* at 41-42. But in considering FTTH facilities, the Commission rejected the exact same argument and found that these circumstances did not support a finding of impairment. *See Triennial Review Order*, 18 FCC Rcd at 17142-43, ¶ 274 ("The record further indicates that FTTH loops display several economic and operational entry barriers in common with copper loops – that is, the costs of FTTH loops are both fixed and sunk, and deployment is expensive.").

[15] In the *Triennial Review Order*, this Commission clearly held that incumbent LECs are not required to unbundle next-generation capabilities. Because SBC Connecticut's coaxial facilities offer such capabilities, the fact that the Commission did not specifically address coaxial technology in the *Triennial Review Order* (*see* AT&T Comments at 14) is of no consequence. The Commission exempted all next-generation broadband capabilities from unbundling. *See Triennial Review Order*, 18 FCC Rcd at 17141-42, ¶ 272.

[16] The fact that Gemini (or any other carrier) may be able to obtain access to a narrowband transmission path on broadband facilities does not create any entitlement to use those same facilities to provide broadband services. *First*, the Commission expressly held that incumbents need not unbundle the next-generation capabilities of *any* broadband facilities. *Second*, the Commission made clear that incumbents can always choose to provide a home run copper loop instead of a narrowband pathway. Because SBC Connecticut offers Gemini either home run copper loops or a narrowband transmission path (where SBC Connecticut has deployed hybrid copper-fiber loops), Gemini's "commitment" to offer narrowband voice service cannot create a right to obtain unbundled access to SBC Connecticut's coaxial facilities.

As SBC Connecticut explained in its Petition, state commissions are bound by this Commission's unbundling determinations and are not free to disregard or to revisit them. Indeed, this Commission made the exact same argument in defending paragraphs 192 through 196 of the *Triennial Review Order* before the D.C. Circuit, asserting that, "[i]n the UNE context, . . . a decision by the FCC not to require an [incumbent carrier] to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption." Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 et al. (D.C. Cir. filed Jan. 16, 2004) (citations omitted). Thus, the Commission's decision not to require the unbundling of next-generation broadband facilities "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," thereby preempting any inconsistent state regulation or requirement. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

SBC Connecticut's preemption claim is therefore on all fours with *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000). In *Geier*, the Department of Transportation ("DOT") had deliberately chosen to phase-in an airbag requirement over a period of years because it thought that requiring airbags on all cars immediately would hurt other policy goals, such as lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance. *See id.* at 875. The Supreme Court held that a state law, which effectively "required [automobile] manufacturers . . . to install airbags" immediately on all cars, directly conflicted with the DOT's policy determination. Because that law thereby "stood as an obstacle to the gradual passive restraint phase-in that the

federal regulation deliberately imposed," *id.* at 881, the Court held that it had to give way to the supremacy of federal law.

That is precisely the case here. The Commission's unbundling decisions constitute a specific "policy judgment" about how the 1996 Act's "congressionally mandated objectives," including the promotion of facilities-based competition and the deployment of advanced telecommunications capabilities, would "best be promoted." *Id.* at 872, 881. *See also Triennial Review Order*, 18 FCC Rcd at 17125, ¶ 241 (describing "broadband deployment" as "a critical policy objective"). Congress assigned that policy judgment to the FCC, and state commissions are bound by this Commission's determinations. Because the DPUC's *Final Decision* conflicts with this Commission's decision not to require the unbundling of next-generation broadband facilities, it directly and substantially prevents the implementation of the federal unbundling regime. As even MCI admits, "[s]uch direct conflicts . . . require preemption under the 1996 Act." MCI Comments at 8.

The DPUC cannot circumvent this clear federal policy by asserting that SBC Connecticut's HFC network, comprised of next-generation facilities, are somehow different because they are already in the field. According to several commenters, because the "HFC facilities are fully deployed," they are "no longer subject to any meaningful investment incentives that might be served by their exclusion from the list of UNEs." *Id.* at 15; *see also* AT&T Comments at 17; DPUC Comments at 15, 17. That is nonsense. Because the DPUC's decision forces SBC Connecticut to subsidize Gemini's entrance into the broadband market, it necessarily eliminates any incentives that Gemini would otherwise have had to continue

investing in its own facilities.[17] *See Triennial Review Order*, 18 FCC Rcd at 17141-42, ¶ 272, 17149, ¶ 288, 17150, ¶ 290, 17153, ¶ 295; *see also USTA II*, 2004 WL 374262, at *23-24. The DPUC's *Final Decision* additionally undermines SBC Connecticut's incentives to invest in new technologies. Had SBC Connecticut known in 1995 that it may be forced to turn its HFC facilities over to a competitor, it likely would never have deployed those facilities. If the DPUC's *Final Decision* is allowed to stand, SBC Connecticut will face the same question when considering investment in any new facilities – if the fact of deployment will permit CLECs to argue in the future that the facilities should be unbundled because there are no longer any disincentives to investment, SBC Connecticut would have to reassess whether to continue investing in those facilities. *See USTA I*, 290 F.3d at 424-425, 427 (discussing disincentives to invest in new technologies caused by unbundling).

B. The DPUC's *Final Decision* Conflicts with This Commission's Determination that Incumbents Need Not Unbundle Hybrid Loops

In the *Triennial Review Order*, this Commission held, as a matter of federal law and policy, that incumbent carriers need not offer unbundled access to the next generation capabilities of hybrid loop facilities. "With respect to providing unbundled access to hybrid loops for a requesting carrier to provide narrowband service," this Commission gave *incumbents* an explicit choice – they can either provide a homerun copper loop or a TDM-based narrowband pathway over the hybrid loop facility. *Triennial Review Order*, 18 FCC Rcd at17153-54, ¶ 296 & n.850.[18] In its *USTA II* decision, the D.C. Circuit upheld the Commission's judgment as a

[17] Gemini has constructed HFC facilities of its own in portions of Connecticut. *See Final Decision* at 42. Despite its "commitment" to offer narrowband voice service over SBC Connecticut's coaxial facilities, Gemini has yet to offer telephone service over its own network.

[18] AT&T concedes that the Commission granted incumbent LECs the right to choose between offering a homerun copper and a TDM-based narrowband pathway, but appears to argue that incumbents still must provide next-generation capabilities to a carrier seeking to provide broadband service. *See* AT&T Comments at 16 & n.3. That is

proper application of its authority under section 251(d)(2) and section 706 of the 1996 Act. *See USTA II*, 2004 WL 374262, at *25-26.

The DPUC's order requiring SBC Connecticut to unbundle its HFC facilities stands in direct conflict with this Commission's policy judgment. In its *Final Decision*, the *Department* concluded that the HFC facilities both "appear to be analogous," and in fact were "equivalent," to the hybrid copper-fiber loops that this Commission addressed in the *Triennial Review Order*. *Final Decision* at 37. The DPUC made this finding of equivalence, and in the very next sentence it held that "[t]herefore, these components should be unbundled." *Id.* As SBC Connecticut explained in its Petition, the DPUC thereby reached precisely the opposite conclusion than this Commission did in the *Triennial Review Order*. Whereas this Commission held that incumbents need not offer unbundled access to any next generation capabilities, and could avoid unbundling hybrid facilities altogether by offering a homerun copper loop, *see Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288, 17153-54, ¶ 296, the DPUC held that SBC Connecticut must offer unbundled access to the next-generation capabilities of the HFC facilities even when it offers a copper loop alternative, *see Final Decision* at 37-38. Because the *Triennial Review Order* and the *Final Decision* cannot be reconciled, the DPUC's determination must give way to the supremacy of federal law.[19] *See Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195.

II. The DPUC's *Final Decision* Is Inconsistent with Federal Law in Numerous Respects

Even if the Commission declines formally to preempt the DPUC's *Final Decision*, the Commission should nevertheless issue a declaration that the DPUC's actions are inconsistent

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nonsense. While CLECs can use a copper subloop or homerun copper to provide xDSL service, the Commission declined to unbundle *any* next-generation capabilities of hybrid loops.

[19] The DPUC does not even attempt to defend this portion of its *Final Decision*. Rather, the DPUC's entire discussion of hybrid facilities is limited to a discussion of Gemini's specific business plan. *See* DPUC Comments at 15-17. That too is inconsistent with the unbundling standards articulated in the *Triennial Review Order*.

with federal law. While the commenters focus almost exclusively on whether the Petition presents an appropriate subject for this Commission to exercise its preemption authority, *see* MCI Comments at 7-9; AT&T Comments at 20, 27-29, they generally ignore SBC Connecticut's alternative request that the Commission simply declare the *Final Decision* to be inconsistent with federal law. SBC Connecticut would then pursue appropriate remedies in court to have the *Final Decision* vacated on the grounds that it violates the state law requirement that any Department unbundling determination be "consistent with federal law."

A. SBC Connecticut's Coaxial Facilities Are Neither a "Network Element" Subject to Unbundling Nor a Part of SBC Connecticut's Local Network

As SBC Connecticut demonstrated in its Petition, it has never once used the subject coaxial facilities to provide a telecommunications service. *See* Petition at 15-16; Declaration of John A. Andrasik ¶ 4 (attached as Exhibit C to the Petition). The DPUC does not seriously contend otherwise. While the DPUC states in passing that the HFC network "was . . . being used to [provide telecommunications services]," DPUC Comments at 9, presumably referring to SBC Connecticut's 1995 HFC-based telephony trial, *see id.* at 6, the DPUC overstates the significance of this short-lived trial over a miniscule portion of the HFC facilities. SBC Connecticut never offered HFC-based telephony to the general public, and it abandoned its solitary trial of this technology more than five years ago. Because the 1996 Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), and in turn defines "telecommunications service" as the offering of telecommunications "directly to the public," *id.* § 153(46), the HFC telephony trial is irrelevant to the question of whether coaxial facilities constitute a network element subject to unbundling. The HFC facilities do not meet the standard articulated by Congress and therefore do not constitute a network element under either the 1996 Act or Connecticut state law. *See* Conn. Gen.

Stat. § 16-247a(b)(7) ("'network elements' means 'network elements,' as defined in 47 USC § 153(a)(29)").

The DPUC contends that the HFC facilities nevertheless constitute a network element because they were "intended to provide voice services." DPUC Comments at 14. "If it had been fully deployed," the DPUC argues, "the HFC network would have been utilized by [SBC Connecticut] to provide narrowband and broadband services." *Id.* at 9; *see also id.* at 14 ("If deployment of I-SNET network had occurred as intended, [SBC Connecticut would have been well on its way to offering telecommunications services over the HFC network"); *Final Decision* at 36 (same). But the 1996 Act in general, and the network element definition in particular, do not speak in terms of what *might* have been. The statute focuses on facilities used in the provision of a telecommunication service, not on hypothetical uses. Whatever SBC Connecticut's plans may have been ten years ago, the fact remains that the coaxial facilities have never been used to provide a telecommunications service, and are not readily capable of being used towards that end.

SBC Connecticut does not contend, as Covad, MCI, and AT&T falsely assert, that a particular facility (such as a spare loop) must actually or currently be used in providing a telecommunications service in order to satisfy the statutory definition of a network element. *See* Covad Comments at 4-7; MCI Comments at 11, AT&T Comments at 5-7. Rather, drawing upon the specific test that this Commission established in the *UNE Remand Order* and then reaffirmed in the *Triennial Review Order*, SBC Connecticut has argued that the coaxial facilities are neither customarily used nor readily capable of being used to provide telecommunications service. *See* Petition at 16 (quoting *UNE Remand Order*, 15 FCC Rcd at 3845, ¶ 328). The DPUC's claim that the coaxial facilities constitute a network element because they were originally "constructed

in part and intended by the Company to provide a full complement of voice data and video services" finds no support in any of this Commission's implementing decisions. *Final Decision* at 36; *see also* DPUC Comments at 9.

The analogy to dark fiber that the DPUC relied upon in its *Final Decision*, and that AT&T invokes here, is instructive. In the *UNE Remand Order*, this Commission noted that dark fiber is much like surplus capacity of facilities that are "dedicated for use in the provision of telecommunications service," and that are "easily called into service" through routine upgrades. *UNE Remand Order*, 15 FCC Rcd at 3844-45, ¶ 327, 3845, ¶ 328. The coaxial facilities are not, and never were, dedicated for use in providing telecommunications services. Nor are they equivalent to any facilities that SBC Connecticut uses to offer telecommunications, as is the case with dark fiber and spare copper loops.

Indeed, it is precisely because the coaxial facilities are neither "customarily" or "routinely" used by SBC Connecticut, in the language of the *UNE Remand Order*, that SBC Connecticut would need to spend in excess of ten million dollars for the HFC network to be capable of being "called into service" to carry telecommunications. *See* Declaration of Don McGregor ¶ 4 ("McGregor Decl.") (attached as Exhibit H to the Petition). But as this Commission held in the *Triennial Review Order*, incumbent LECs cannot be required "to *alter substantially* their networks" in order to provide access to unbundled network elements. *Triennial Review Order*, 18 FCC Rcd at 17371, ¶ 630 (emphasis in original) (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir. 1997). Nor do incumbent carriers need to perform network modifications beyond those that would be routinely undertaken for their retail customers. *See id.* at 17371-77, ¶¶ 632-640; *see also USTA II*, 2004 WL 374262, at *21 ("the distinction between a 'routine modification' and a 'superior quality' alteration turns on whether

the modification is of the sort that the ILEC routinely performs, on demand, for its own customers"). The fact that the coaxial facilities require such a dramatic overhaul, far in excess of the "routine modifications" that this Commission has required, *see* 47 C.F.R. § 51.319(a)(8), lends further support to the conclusion that these facilities are not a network element subject to unbundling.

AT&T's assertion that this ten million dollar upgrade is "no different in kind than the types of activities (*e.g.*, adding electronics) that ILECs and CLECs routinely perform in using unbundled network elements such as dark fiber" finds no support in the record, and reflects AT&T's presumption that the coaxial facilities are analogous to a local loop. AT&T Comments at 8. In stark contrast to the electronics that incumbent LECs routinely attach when lighting dark fiber, SBC Connecticut could not make the HFC facilities capable of carrying telecommunications without: (i) purchasing new products, equipment, and technology that SBC Connecticut does not use or maintain in its inventory; (ii) hiring and training a separate workforce to provision and maintain the HFC facilities; (iii) operating a second network exclusively for Gemini that SBC Connecticut itself will never use; and, (iv) developing a new and separate operating and support systems for the ordering, provisioning, maintenance, repair, and billing of the HFC facilities. *See* McGregor Decl. ¶¶ 4-5. There is nothing "routine" about any of these modifications.

Nor is there any merit to the commenters' argument that Gemini, rather than SBC Connecticut, would perform and fund these modifications. DPUC Comments at 14; Gemini Comments at 11. *First*, Gemini's alleged offer to undertake these extraordinary modifications has no effect on whether the coaxial facilities satisfy the regulatory definition of a network element. If it did, any CLEC could circumvent the 1996 Act by making a similar offer. *Second*,

as SBC Connecticut explained in its Petition, the coaxial facilities are physically overlashed on the distribution gain and wrapped around the fiber that SBC Connecticut uses to provide telecommunications services to its customers – fiber that SBC Connecticut also makes available to other carriers on an unbundled basis. *See* Petition at 16 n.14. For SBC Connecticut to ensure "'the reliability and security of [its] network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements,'" SBC Connecticut must maintain responsibility for and control over the coaxial facilities. *Verizon Communications v. FCC*, 535 U.S. 467, 535, 536 (2002) (quoting *Local Competition Order*, 11 FCC Rcd at 15648, ¶ 296.[20] None of the commenters offer any response to this fact.

Finally, the fact that the coaxial facilities are not a part of SBC Connecticut's local network further evidences the chasm that separates these facilities from any other equipment that has ever been deemed a network element for purposes of the 1996 Act.[21] As the DPUC admits, SBC Connecticut originally deployed the HFC facilities as part of an effort to replace its legacy network. *See* DPUC Comments at 9 ("The HFC network was approved by the CTDPUC to supersede the Company's existing infrastructure."); *see also* Gemini Comments at 14. SBC Connecticut deployed the HFC facilities parallel to, but separate and apart from, its legacy telecommunications facilities. SBC Connecticut never integrated those facilities into its local

[20] When SBC Connecticut offered to sell the coaxial facilities to Gemini if it would shoulder the costs of separating the coaxial facilities out from the fiber, Gemini responded by filing its Petition with the DPUC requesting an order compelling SBC Connecticut to offer the coaxial facilities on an unbundled basis.

[21] Covad apparently agrees that the HFC facilities are not a part of SBC Connecticut's local exchange network, *see* Covad Comments at 3, but somehow contends that the DPUC was not acting under section 251 of the 1996 Act, *see id.* at 2. According to Covad, *SBC Connecticut* has "attempt[ed] to shoehorn its HFC cable facilities into section 251 of the Act, governing incumbent carriers' local exchange facilities." *Id.* at 8. Covad has evidently failed to read the DPUC's *Final Decision*, and may want to do so before making any future assertions. Its comments are so wide of the mark that they do not merit any response.

network, and has never used those facilities to provide local telecommunications service.[22] Nothing in the language of, or the motivation behind, the 1996 Act suggests that Congress intended that these separate, non-telecommunications facilities could be made subject to unbundling.

B. The DPUC's Unbundling Analysis Is Inconsistent with Federal Law

Even if the DPUC had the authority to require unbundling of a new network element, and even if the coaxial facilities were a proper subject of that analysis, the fact remains that the DPUC flouted the standards set forth in the 1996 Act as interpreted by this Commission and the federal courts. The DPUC focused exclusively on a single carrier's business plan, notwithstanding this Commission's plain statement that a carrier specific analysis was improper. Despite this Commission's instruction, the DPUC ignored the fact that SBC Connecticut makes UNEs available to any requesting CLEC. Likewise, in violation of the *USTA II* decision, the DPUC disregarded SBC Connecticut's retail and tariffed offerings.

Ultimately, the DPUC based its impairment finding on an incomprehensible mixture of various standards mentioned at some point in the *Local Competition Order*, the *UNE Remand Order*, and the *Triennial Review Order*. The DPUC's focus in its *Final Decision* on the allegedly "inferior" quality of service provided over SBC Connecticut's standard UNE offerings (*see Final Decision* at 42) flows straight from the *Local Competition Order* (*see id.* at 31, discussing *Local Competition Order* standard where decrease in quality can establish impairment). The DPUC repeats that same error in its comments, arguing that "in the context of

[22] The fact that these facilities have never been used, and are not readily capable of being used to provision telecommunications services distinguishes them from the entrance facilities that the D.C. Circuit addressed in its *USTA II* decision. Because entrance facilities were used to backhaul telecommunications traffic, the Court held that they appeared to meet the definition of a network element. *USTA II*, 2004 WL 374262, at * 28-29. Recognizing that these facilities stood separate and apart from the local network, and suggesting that CLECs should bear the cost of constructing these facilities, the Court remanded for the FCC to explain why they should not be subject to unbundling.

[§ 251(d)(2)(B)], the Commission construed 'impair' . . . as to make or cause to become worse; diminish in value." DPUC Comments at 19 (citing *Local Competition Order*). But the Supreme Court invalidated this specific standard in *Iowa Utilities Board*. Because the DPUC could not legally pick and choose elements of unbundling standards that the federal courts have expressly rejected, the Commission must declare that the DPUC's unbundling analysis violates federal law.

Remarkably, the DPUC concedes that its analysis focused exclusively on Gemini and Gemini's business plan. In attempting to defend its unbundling decision, the DPUC invokes its determination that Gemini would "be impaired operationally if it were required to purchase facilities that it deems inferior to those of the HFC network," DPUC Comments at 21, and its finding that SBC Connecticut's "HFC network is the only one that can satisfy Gemini's needs," *id.* at 22. "Based on the evidence in the administrative record," the DPUC contends, it "concluded that denying access to the HFC facilities in question would impair Gemini's entry into the market and its service offering to consumers." *Id.* at 23.

The DPUC does not even attempt to reconcile its exclusive focus on Gemini with the *Triennial Review Order*, in which this Commission rejected such a "subjective, individualized approach" to unbundling. 18 FCC Rcd at 17056-57, ¶ 115. There, the Commission determined that it would not, "as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs." *Id.*; *see also id.* ("we agree with commenters that argue we cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired."). Because the DPUC restricted its analysis to Gemini's business plan and Gemini's asserted service needs, it cannot be reconciled with the *Triennial Review Order*.

While the DPUC contends that it was obligated to look at the services that *Gemini* wanted to offer, the D.C. Circuit has already rejected that specific argument. *See* DPUC Comments at 10; AT&T Comments at 19. In vacating the line sharing rules, the Court held that the Commission had improperly focused on "DSL because that is what 'CLECs seek to offer when they request line sharing.'" *USTA I*, 290 F.3d at 429. The 1996 Act, the Court explained, did not allow the Commission to ignore the competitive context by focusing so narrowly on one particular product; this was true even though multiple CLECs wanted to provide DSL services.

Indeed, the Commission need look no further than the DPUC's narrow focus on Gemini's "business model" to find the fundamental error in the DPUC's analysis. As the DPUC acknowledged, "Gemini has implemented a technical plan that relies in part . . . [on SBC Connecticut's] HFC network." DPUC Comments at 22; *see also id.* (Gemini defined its business plan such that SBC Connecticut's "HFC network is the only one that can satisfy Gemini's needs"). But SBC Connecticut's obligations do not turn on Gemini's individual preference. *See Triennial Review* Order, 18 FCC Rcd at 17056-57, ¶ 115 (refusing "to reward those carriers . . . whose business plans simply call for greater reliance on UNEs"). Because SBC Connecticut provides unbundled access to copper loops, copper subloops, or a narrowband transmission path to every customer that it serves in the state of Connecticut, neither Gemini nor any other carrier can be "impaired" without unbundled access to SBC Connecticut's coaxial facilities. The DPUC improperly ignored the availability of these alternative facilities, concluding that Gemini would be impaired if it were required to use "facilities that it deems are inferior to those of the HFC network." *Final Decision* at 41.[23] But as the D.C. Circuit explained in language that applies

[23] In upholding this Commission's unbundling rules for hybrid facilities, the D.C. Circuit rejected CLECs' arguments that they should not be required to use "inferior" copper loop facilities. *See USTA II*, 2004 WL 374262, at *26 (copper loops and subloops may not be "a perfect substitute for the ILECs' hybrid loops, . . . [but] they are a partial substitute").

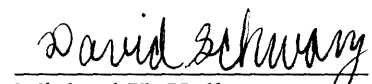
with equal force to the DPUC, "[w]hat the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs." *USTA II*, 2004 WL 374262, at *3.

If, as Gemini contends, a CLEC could simply define a business plan around specific incumbent facilities, and claim that their business plan would be destroyed if they were forced to duplicate those facilities, unbundling obligations would know no bounds. Congress, the Supreme Court, the D.C. Circuit, and this Commission have expressly rejected that proposition.

Conclusion

For the foregoing reasons, SBC Connecticut respectfully requests that the Commission grant its Petition, and issue an order either preempting the DPUC's *Final Decision* or simply declaring it to be inconsistent with federal law.

Respectfully submitted,



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March 15, 2004

Exhibit A

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 03-01-02 PETITION OF GEMINI NETWORKS CT, INC. FOR A DECLARATORY RULING REGARDING THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED NETWORK ELEMENTS

November 3, 2003

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DRAFT DECISION

This draft Decision is being distributed to the parties in this proceeding for comment. The proposed Decision is not a final Decision of the Department. The Department will consider the parties' arguments and exceptions before reaching a final Decision. The final Decision may differ from the proposed Decision. Therefore, this draft Decision does not establish any precedent and does not necessarily represent the Department's final conclusion.

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DECISION

I. INTRODUCTION

A. SUMMARY

Gemini Networks CT, Inc. (Gemini) has requested by Petition dated January 2, 2003 (Petition) that the Department of Public Utility Control (Department) issue a Declaratory Ruling finding that certain hybrid fiber coaxial facilities (HFC) owned by the Southern New England Telephone Company (Telco or Company) be deemed unbundled network elements (UNE) and be offered on an element by element basis to Gemini at total service long run incremental cost (TSLRIC) pricing. The Office of Consumer Counsel (OCC) and the Office of the Attorney General (AG) support the Petition. The Telco opposes the Petition in that it argues, inter alia, that the HFC facilities in question are not subject to unbundling.

In this Decision, the Department has determined that the HFC facilities in question are subject to unbundling and hereby orders the Telco to unbundle the HFC network. The Telco and Gemini shall share in the cost of conducting an inventory of the available HFC plant. The cost of developing the operational support systems (OSS) shall be borne by Gemini.

B. BACKGROUND OF THE PROCEEDING

By Petition received on January 2, 2003, Gemini[1] requested that the Department issue a declaratory ruling finding that certain hybrid fiber coaxial facilities owned by the Telco, formerly leased to SNET Personal Vision, Inc. (SPV), constitute UNEs and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental cost pricing. Should the Department determine that those facilities are UNEs subject to appropriate unbundling and pricing, Gemini also requested that the Department initiate a cost of service proceeding to determine the appropriate pricing structure for the elements, based on TSLRIC. Gemini further requested the Department direct the Telco to file an inventory of all plant formerly leased to SPV, including the condition of all such plant and the disposition of any plant no longer in place.[2]

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[1] Gemini was awarded its Certificate of Public Convenience and Necessity (CPCN) to offer wholesale Internet Access service to three Connecticut towns by the Department's Decision dated September 1, 1999 in Docket No. 99-03-12, Application of Gemini Networks, Inc. for a Certificate of Public Convenience and Necessity. In the Decision dated January 17, 2001 in Docket No. 00-10-20, Application of Gemini Networks, Inc. to Expand its Certificate of Public Convenience and Necessity, Gemini was also granted facilities-based authority to provide wholesale telecommunications services throughout Connecticut. Additionally, by the Decision dated September 28, 2001 in Docket No. 01-06-22, Application of Gemini Networks, CT, Inc. To Expand its Certificate of Public Convenience and Necessity, Gemini was authorized to provide retail facilities-based and resold local exchange telecommunications services throughout Connecticut.

[2] Petition, p. 1.

In response to the Petition, the Telco requested that this proceeding be bifurcated.[3] Specifically, the Telco requested that the first phase of this proceeding address the legal issues. The Telco stated that should the Department find in Gemini's favor on the legal issues in the first phase of the proceeding, then a second phase could be initiated to address Gemini's other requested relief. The Telco also proposed that the Petition be stayed pending the Federal Communications Commission's (FCC or Commission) decision in its Triennial Review Proceeding.[4]

In its February 10, 2003 response to the Telco Request, the Department concluded that the Petition was seeking a determination as to whether the HFC network was subject to unbundling pursuant to the General Statutes of Connecticut (Conn. Gen. Stat.) §16-247b(a). The Department also concluded that before these network facilities could be subject to arbitration (as provided for by §252 of the Telecommunications Act of 1996 (Telcom Act)), a determination must first be made that the HFC facilities may be unbundled pursuant to Conn. Gen. Stat. §16-247b(a). Accordingly, the Department denied the Telco's request to dismiss the Petition. The Department also denied the Telco's request to stay its investigation pending the FCC's ruling in its Triennial Review Proceeding. Finally, the Department concluded that the Telco's proposal to bifurcate this proceeding into two phases with only the legal issues being addressed in phase one and addressing Gemini's request for a cost study and inventory in phase two, was of merit and established a procedural schedule to develop a record on which this Decision is based.

C. CONDUCT OF THE PROCEEDING

By Notice of Hearing dated March 10, 2003, and by Notice of Rescheduled Hearings dated May 29, 2003, the Department announced that hearings would be held on June 23, 2003 and June 24, 2003, at the Department's offices, Ten Franklin Square New Britain, Connecticut 06051. By Notice of Close of Hearing dated August 6, 2003, those hearings were cancelled.

On August 21, 2003, the FCC issued its order in Triennial Review Proceeding (TRO). In light of that order, the Department reopened the record of this proceeding and requested written comments and reply comments discussing the weight, if any, the TRO[5] should be given by the Department as it addressed the Petition.[6]

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[3] Telco January 23, 2003 Letter to the Department (Telco Request), p. 1.

[4] See CC Docket No. 01-339, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (Triennial Review Proceeding).

[5] The TRO achieved three primary goals. First it continues the Commission's implementation and enforcement of the Telcom Act's market-opening requirements by applying the experience the FCC has gained implementing that act. Second, the TRO applies unbundling as Congress intended: with a recognition of the market barriers faced by new entrants as well as the societal costs of unbundling. Third, the TRO established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers. TRO, ¶5. The FCC also states that the framework set forth in the TRO recognizes that this competition is taking place on an intermodal basis -- between wireline providers and providers of services on other platforms such as cable and wireless – and on an intramodal basis among wireline providers with different business and operational plans. Id.

The Department issued its draft Decision in this docket on November 3, 2003. All parties were offered the opportunity to file written exceptions and present oral argument concerning the draft Decision.

D. PARTIES AND INTERVENORS

The Department recognized the Southern New England Telephone Company, 310 Orange Street, New Haven Connecticut 06510; SNET Personal Vision, 310 Orange Street, New Haven Connecticut 06510; Gemini Networks CT, Inc., c/o Murtha Cullina, LLP, CityPlace I, 185 Asylum Street, Hartford Connecticut 06103-3469; and the Office of the Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051, as parties to this proceeding. The Office of the Attorney General for the State of Connecticut and Cablevision Lightpath-CT, Inc. requested and were granted intervenor status to this proceeding.

II. PETITION

Gemini requested that the Department declare that certain Telco HFC facilities formerly leased to SPV constitute UNEs and as such, must be tariffed and offered on an element by element basis for lease to Gemini at TSLRIC pricing. Gemini also requested that in the event that these facilities are UNEs, that the Department immediately initiate a cost of service proceeding to determine the appropriate pricing structure, based on TSLRIC. Gemini further requested that the Department order the Telco to provide an inventory of all plant formerly leased to SPV including the condition of all such plant and the disposition of any plant no longer in place.[7]

Gemini claims that it has attempted to enter into negotiations with the Telco for lease of portions of the HFC facilities pursuant to state and federal law. Gemini also claims that the Telco refused to negotiate the lease of these facilities because the Telco did not consider these facilities as UNEs; and therefore, they were not subject to unbundling or regulation as unbundled network elements. Accordingly, Gemini requested the Department declare the HFC facilities to be UNEs so that it may re-enter negotiations with the Telco to obtain access to certain of the unbundled network elements pursuant to applicable pricing and regulations.[8]

In the opinion of Gemini, the Petition furthers the goals of Connecticut codified in Conn. Gen. Stat. §16-247(a) to promote the development of effective competition, facilitate the efficient development and deployment of an advanced telecommunications infrastructure and encourage the shared use of existing facilities. Gemini further submits that its request will benefit all parties, because it will promote competition to the benefit of consumers, assist Gemini in the rapid deployment of its network and services, and provide revenue to the Telco for currently unused portions of its network.[9]

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[6] See the August 25, 2003 Notice of Reopened Record and Request for Written Comments and Reply Comments (Reopen Notice).

[7] Petition, p. 1.

[8] Id.

[9] Id., p. 2.

Therefore, Gemini requests that the Department (a) declare that the HFC network formerly leased by SPV is subject to unbundling and tariffing as UNEs pursuant to Conn. Gen. Stat. § 16-247b(a); (b) conduct an expedited cost of service proceeding to determine the rates at which these UNEs will be offered pursuant to Conn. Gen. Stat. § 16-247b(b); and (c) order the Telco to provide an immediate inventory of the remaining HFC plant, including the condition of such plant and an itemized list of any portions of the plant previously disposed of by the Company.[10]

III. POSITIONS OF PARTIES AND INTERVENORS

A. GEMINI NETWORKS CT, INC.

Gemini argues that it is seeking unbundled access to local loops owned and controlled by the Telco because state and federal law require that the local loop be unbundled.[11] In the opinion of Gemini, it is irrelevant what architecture an incumbent local exchange carrier (incumbent LEC or ILEC) employs in its local network and whether the loops are constructed with ratepayer or shareholder money. Gemini states that competitive local exchange carriers (CLEC) are entitled to nondiscriminatory, unbundled access to local loops and that the Department should direct the Telco to unbundle its HFC network and move to the pricing phase of this proceeding.[12]

Gemini notes that the FCC has maintained that under any reasonable interpretation of the "necessary" and "impair" standards of §251(d)(2) of the Telcom Act, loops are subject to unbundling obligations. According to Gemini, it has merely sought nondiscriminatory unbundled access to local loops. Gemini contends that the Telco's HFC network is nothing more than a local loop that must be unbundled.

Gemini cites to the FCC's regulations that require ILECs to provide nondiscriminatory access to the local loop and subloop, including inside wiring owned by the incumbent LEC, on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service. Therefore, the Telco is not relieved of its unbundling obligations because of the way in which it designed its HFC network. Irrespective of whether the loop is copper, HFC, or one that has been enhanced by fiber and utilizes a remote terminal, Gemini maintains that it is still a UNE loop, as defined by the FCC, and subject to unbundling. The intention of the FCC is to ensure that the definition of a loop will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access loops as a UNE as long as that access is required pursuant to §251(d)(2) of the Telcom Act. Gemini also maintains that neither self-provisioning loops nor obtaining them from third-party sources is a sufficient substitute that would justify excluding them from the unbundling obligation under §251(c)(3) of the Telcom Act.

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[10] Id., p. 11.

[11] The Telco maintains that if this matter is about unbundling the local loop, it should be dismissed as moot because the Department has previously established unbundled access and pricing for those UNEs. Telco Reply Brief, p. 7.

[12] Gemini Brief, p. 1.

Gemini also notes that the Department has concurred with the FCC's ruling that local loops must be unbundled and that such unbundling is critical to encouraging market entry, as well as its requirement that the Telco provide CLECs unbundled local loops.[13] Therefore, because the HFC network is comprised of local loops, it must be unbundled.[14] Additionally, Gemini contends that the Telco bears the burden of proving that unbundling the HFC network is technically infeasible in order to avoid its unbundling obligations.[15] In the opinion of Gemini, unbundling the HFC network must be deemed feasible and as a result, should form the basis for the Department's Decision in this matter.[16]

Gemini cites as an example, the Department's authority pursuant to 47 U.S.C. § 251(d)(3) and 47 C.F.R. § 51.317 to unbundle the HFC network. In the opinion of Gemini, the plain language of the Telcom Act and the FCC's implementing orders clearly authorize the Department to establish unbundling obligations, including unbundling the HFC network. The states' independent authority to order unbundling beyond the national list has been confirmed by the courts. Additionally, the Department has recognized its own independent state authority to rebundle network elements even after the Eighth Circuit Court of Appeals removed all requirements under the Telcom Act for an ILEC to offer such rebundled elements under federal law.[17]

Relative to state law, Gemini contends that the Department has ample authority to unbundle the HFC network. According to Gemini, Conn. Gen. Stat. §16-247b(a), confers on the Department a wide spectrum of powers to unbundle any portion of the Telco's network amenable to unbundling, including the HFC network. Gemini contends that the only qualification on the unbundling of the Telco's local network is that the network element be "used" to provide telecommunications service.

Gemini notes that the Department has additional, slightly more restrictive unbundling authority under Conn. Gen. Stat. §16-247b(b) because it requires the network element to be "necessary" to the provision of telecommunications services. Gemini states that there is no limiting language in Conn. Gen. Stat. §§16-247b(a) and 16-247b(b) that would prohibit the Department from unbundling any portion of the Telco's network based on the type of architecture used or the capabilities of the network

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[13] See the May 5, 1999 Decision in Docket No. 98-11-10, Application of ACI Corporation for an Advisory Ruling on The Southern New England Telephone Company's Provision of Unbundled Loops to Competitive Local Exchange Carriers, p. 11.

[14] According to the Telco, the coaxial distribution facilities cannot be network elements because they are not a facility or function used in the provision of a telecommunications service as required by the Telcom Act and state statute. The Telco states that those facilities are not part of, or connected to the telecommunications network. Nor are they a loop because they are not connected to the Telco's distribution frame or its equivalent in the central office and are not connected to the telecommunications demarcation point at the end user location. Telco Reply Brief, pp. 4 and 5.

[15] According to the Telco, Gemini's contention is misplaced and premature. Based on the Department's bifurcation of this proceeding, the central issue in this phase of the proceeding is whether the Telco's coaxial distribution facilities are subject to federal and state unbundling rules. Id., p. 7.

[16] Gemini Brief, pp. 6-10.

[17] Id., pp. 10-16. The Telco states that Gemini ignores the fact that the Supreme Court vacated all of the FCC's unbundling rules in its own Iowa Utilities decision as did the D.C. Circuit Court in United States Telecom Association, et al., v. Federal Communications Commission (USTA). According to the Telco, under the Hobbs Act, the USTA decision is the law of the land. Telco Reply Brief, p. 12.

for the provision of advanced services. Gemini argues that it is immaterial that the network was constructed as an HFC network or previously utilized to transport video signals. The only relevant inquiry is whether the network is capable of being used for telecommunications services.

Gemini also notes that Conn. Gen. Stat. §16-247f(a) obligates the Department to regulate telecommunications services in a manner that is designed to foster competition and protect the public interest. That statute also reflects the remedial nature of the whole body of law governing the provision of telecommunications services in Connecticut. Additionally, Gemini claims that the intent of the legislature is to foster competition, protect the public interest and promote the shared use of existing facilities. In the opinion of Gemini, the unbundling of the Telco's HFC network pursuant to the Conn. Gen. Stat. §16-247b(a) achieves the General Assembly's goals, especially because it involves the use of an already existing, dormant network.

Gemini asserts that state commissions have the right to order unbundling of ILEC network functions and features that go beyond the national list of UNEs, as long as they are consistent with federal law. The Connecticut statutes providing for telecommunications competition share the same goals as the Telcom Act and are consistent with that act. In the opinion of Gemini, the full objectives of the Telcom Act are designed to embrace state law by meeting local needs with federal guidance. The Connecticut Supreme Court has also recognized the Department's jurisdiction to regulate pursuant to the provisions of state law despite the presence of the Telcom Act.[18]

Further, Gemini disagrees with the Telco that the Department has no jurisdiction over the coaxial distribution facilities because they were not used to provide telecommunications services and, therefore, not subject to unbundling. Gemini argues that the evidence demonstrates that the HFC network was in fact used for telecommunications services and is capable of such use. According to Gemini, the HFC network need only be capable of providing one telecommunications service in any manner by which a CLEC seeks to provide such service.

Gemini contends that the purpose of the Telco's I-SNET Technology Plan (I-SNET) was to provide a full suite of voice, data and video services. The goal of which was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure in that it included the total migration of the interoffice transport network to a SONET-based digital broadband platform and retirement of the existing embedded base of copper cable, circuit switching, computing and associated common and complementary assets.

While noting that SPV was granted a statewide cable television (CATV) franchise to provide video services over the I-SNET network, Gemini states that SPV leased network capacity from the Telco for purposes of deploying cable television services. SPV was also responsible for certain direct costs relating to video and 50% of the HFC

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[18] Gemini Brief, pp. 16-19.

network costs. Gemini maintains that the basis for this cost-sharing arrangement was the prospect that each home passed by the HFC network would subscribe to Telco telephone service and SPV cable service. Gemini also contends that the HFC network was planned and designed to serve voice customers and to provide transport for video services, in effect, to be used as the Telco's local exchange network. Therefore, Gemini disagrees with the Telco's claim that the HFC network is not capable of use for telecommunications services and suggests that the Department review the Company's telephony trial logs and make its own determination as to the capability of that network.

Gemini also argues that the Telco's focus on its use of the network is misplaced because the courts have consistently held that it is not the use of the facilities that is relevant in any inquiry, but the capability. Gemini cites to the Fourth Circuit Court of Appeals (Fourth Circuit), wherein Bell Atlantic claimed that its equipment must be in actual use, and not capable of being used in order to qualify as a network element. Gemini claims that the Fourth Circuit rejected this argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" is broadly defined. Gemini applies the same analogy in the instant case and contends that the HFC network does not become "used in the provision of telecommunications service" only when someone starts to communicate over the network.

Additionally, Gemini cites to the FCC wherein it analyzed the issue of whether an element must be "used" in the strict sense in order to be subject to unbundling. Gemini claims that the FCC reviewed this issue in the context of dark fiber and that the Commission found that an element is subject to unbundling if it is already installed and easily called into service, similar to the unused capacity of other network elements. The FCC also found that unused transport capacity, such as that of the HFC network, is a feature, function and capability of a facility qualifying as used to provide telecommunications services.

Gemini notes that it is not required to provide the full suite of telecommunications services that the Telco is required to provide. To the extent that the HFC network is not capable of supporting some services, Gemini argues is irrelevant to any determination in this proceeding. The Telco is required to unbundle the network and allow nondiscriminatory access to provide only those services which Gemini seeks to provide. In the opinion of Gemini, the services that it seeks to provide are capable of being delivered over the HFC network, as evidenced by the Telco's service trial logs, by Gemini's provision of such services over its HFC network and by other companies offering of services over HFC networks in different parts of the country.[19]

Further, since the HFC network is a local loop, Gemini maintains that it is presumptively impaired by being denied access to the network. Whether the Department can unbundle additional elements beyond the national list is not subject to legitimate dispute; rather, the only question is what standard applies to the unbundling analysis. While acknowledging that the USTA decision is on appeal, Gemini argues that the Department is in no way prevented from ordering the Telco's HFC network to be unbundled. According to Gemini, the D.C. Circuit Court addressed only the FCC's

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[19] Id., pp. 19-25.

interpretation of the "impair" standard, and did not limit the ability of the states to utilize their authority to adopt state-specific unbundling requirements under the Telcom Act. Gemini states that the Department need only ensure that its unbundling regime fulfills the pro-competitive purposes of the Telcom Act.

Gemini cites to 47 C.F.R. § 51.317, which it contends provides for unbundling of a proprietary element if access to the element is "necessary," and access to a non-proprietary element if lack of access to that element would "impair" the new entrant's ability to provide the service it seeks to offer. Because the FCC has concluded that the "necessary" standard applies only to proprietary network elements, it does not apply to the HFC network because loops are, in general, not proprietary in nature. Gemini asserts that the Telco's HFC network is no different than that currently being employed by Gemini, incumbent cable companies or other broadband service providers. Moreover, Gemini argues that the Telco cannot claim a proprietary interest in the HFC network because it has been abandoned and has no commercial value.

Relative to the impair standard, while noting that this issue has been remanded by the D.C. Circuit Court, Gemini argues that the associated impairment factors are not relevant to unbundling the HFC network and those that do, favor its unbundling. Gemini also argues that there is no dispute that competitors are unable to economically duplicate the Telco's HFC network in those portions of Connecticut in which it exists. In promulgating the Telcom Act, it was Congress' expectation that new competitors could use ILEC UNEs until it was practical and economically feasible for them to construct their own networks. Gemini maintains that it is impaired without unbundled access to the HFC network and such impairment reaches all customers that can be served by that network.

Gemini further maintains that material cost disadvantages favor unbundling. While noting that the D.C. Circuit Court discussed whether a cost disadvantage is "material" if it is a typical cost shared by any new entrant in an industry, Gemini suggests that the Department distinguish between typical costs a new entrant faces in any industry compared to those experienced by CLECs. Such a comparison would examine the impact of the Telco's existing HFC network, which new entrants cannot duplicate without possessing a massive customer base. Gemini claims that the FCC recognized such sunken costs are a substantial barrier to market entry and that similar barriers to entry such as securing pole licenses are under the predominant control of the Telco. Therefore, the enormous cost disadvantages faced by CLECs are not typical of new entrants in other common industries.

Moreover, Gemini asserts that the very existence of the Telco's HFC network represents a barrier to entry completely within the control of the Company because it is occupying the last useable space on the poles. Gemini states that in order for it to construct its own HFC network, the Telco would either have to remove its HFC network or replace the existing poles with taller poles and move the existing facilities to another pole. In either case, Gemini claims that it would incur charges for the necessary make-ready work. This is cost-prohibitive and would be a waste of deployed communications assets which is contrary to the goals of the Conn. Gen. Stat. §16-247a.

Gemini also notes that the D.C. Circuit Court has required the FCC to consider the entire competitive context in making an unbundling determination. According to Gemini, unbundling of the Telco's HFC network is consistent with the competitive goals of state statutes and the Telcom Act. In addition to encouraging Gemini's investment in its own facilities, unbundling of the HFC network would allow Gemini to build a customer base from which it could raise capital to expand its own network.

Unbundling of the HFC network is also the best way to reduce the market power that the Telco and incumbent cable companies currently exercise in the provision of broadband services. Gemini suggests that the large economies of scale in wireline and cable networks and significant costs of expansion will prevent most competitors from entering the broadband market and by requiring the Telco to unbundle its existing HFC network, competitive carriers will be permitted to enter the market.

Gemini also maintains that unbundling of the HFC network will afford CLECs the opportunity to provide broadband service to those customers that cannot be reached through the Telco's existing copper network. Unbundling of the HFC network would also afford these providers an opportunity to combine leased HFC network components with their own facilities to deliver a combination of voice and advanced services. This ability to offer these services is critical to any hope for sustained meaningful competition in voice services, especially at the residential level.

Gemini notes that neither the D.C. Circuit Court nor the Supreme Court adopted the "essential facilities doctrine" of antitrust law. In the opinion of Gemini, unbundling of the HFC network comes close to meeting the essential facilities doctrine. While disagreeing with the Telco argument that alternatives exist for Gemini's provision of services, it claims that such alternatives are not viable, concrete, nor do they permit the offering of comparable services.

Moreover, Gemini argues that use of the Telco's copper-only network merely provides Gemini with a service-delivery option that the Company is spending billions of dollars to avoid. Rather than use its own existing copper network for the provision of advanced services, Gemini notes that the Telco is deploying Project Pronto. The FCC has refused to recognize an ILEC's existing services as a substitute for access to unbundled network elements. According to Gemini, if the Telco is successful in requiring Gemini to utilize existing services and other portions of the Company's copper network, it would force Gemini to abandon its facilities-based business plan and effectively lose its ability to compete. Gemini is adamant that the Telco's existing copper network does not provide the kind of complete end-to-end connectivity that Gemini requires as part of its business plan. Nor is there any presumption under federal and state law that competitors will not construct duplicative networks. Gemini contends that its technical plan requires an HFC architecture which is faster and provides more consistent speeds for data transmission over the entire geographic reach of its network. In lieu of access to the HFC network, the Telco would impose an architecture on it that is a technologically inferior copper twisted pair. Gemini claims that the Telco cannot dictate the technology, method or parameters by which a CLEC offers service.[20]

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[20] See the May 5, 1999 Decision in Docket No. 98-11-10.

Gemini commits to continuing constructing additional portions of its HFC network and that the interconnection of its existing network with the Telco's (not with the Company's twisted pair copper loop network), will provide the interoperability and open networks envisioned by the Connecticut statutes. Gemini asserts that options for CLECs to replicate networks in lieu of gaining unbundled access have consistently been rejected. Gemini argues that requiring CLECs to invest in duplicative facilities would delay market entry and postpone benefits to consumers and is an economic barrier to entry that has been rejected by the FCC and the Supreme Court. Gemini also asserts that it would be cost-prohibitive to construct a duplicate network in those areas where the Telco's network currently exists and would amount to a waste of resources.[21]

Relative to the TRO, Gemini states that the FCC explicitly confirmed the Department's right to unbundle the HFC network pursuant to state law. The FCC has also reaffirmed its interpretation of 47 U.S.C. § 251(d)(3) as preserving state authority to unbundle, as long as it does not conflict with the Telcom Act. Gemini also states that the FCC also rejected the ILECs' arguments that the states are preempted from making unbundling determinations and that the Telco has previously recognized the Department's authority to unbundle pursuant to state law.[22]

Additionally, Gemini claims that the FCC addressed the issue surrounding the definition of network element and whether such elements must be used vs. merely capable of being used. In the opinion of Gemini, the FCC has required that network elements that are capable of being used to provide telecommunications services must be unbundled, irrespective of whether they are used for telecommunications services.[23]

Gemini also contends that the FCC has reaffirmed that a carrier is impaired when lack of access to an ILEC's network elements poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. According to Gemini, the TRO establishes the barriers to entry that must be considered in any impairment analysis: scale economies, sunken costs, first-mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC. In applying the impairment test, the Department must determine whether the sum of the barriers is likely to make market entry uneconomic, taking into account any countervailing advantages that a CLEC might have.

In the TRO, the FCC has also determined that actual marketplace evidence is the most persuasive and useful to any impairment analysis. Accordingly, Gemini suggests that the Department evaluate the extent to which competitors are providing retail services in the relevant market using non-incumbent LEC facilities and the deployment of intermodal technologies. Gemini also suggests that the Department is in the best position to perform the necessary "granular" analysis concerning customer classes, geography and relevant services.

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[21] Gemini Brief, pp. 25-37.

[22] Gemini September 12, 2003 Comments, pp. 3 and 4.

[23] Id., pp. 4 and 5.

Gemini states that an in-depth review of those factors demonstrates that it is impaired by denial of access to the HFC network. Moreover, the TRO requires the Department to consider that Gemini is seeking access to the Telco's HFC loop facilities to provide basic voice-grade telephony services to mass market customers. Gemini claims that the FCC has concluded that facilities capable of providing such mass market voice-grade services are to be afforded the maximum unbundling, because that market is the most competitively underserved. Gemini asserts that the greatest impairment factor associated with serving the mass market is the necessary duplication of mass market loop facilities absent any guaranteed return on the investment. According to Gemini, the Telco had its own mass market captive customer base and regulated rates to fund the costs of construction of the HFC network.

Gemini further argues that the Telco has enjoyed the advantages of a first-mover as the incumbent LEC, which it extended to SPV. Gemini cites as an example the Telco not having to wait to secure pole licenses or pay for the shifting of its facilities from one utility pole to another. Finally, Gemini claims that the Telco enjoyed its existing pool of skilled labor and back office services in constructing that network. Moreover, Gemini claims that the FCC has recognized the impairment caused by Gemini and other competitors would experience in attempting to overcome the Telco's well-established brand name in order to convince reluctant mass market customers to switch their basic telephone service.

Gemini also claims that the FCC believed it was necessary to weigh other considerations that factor into the incentive to deploy advanced networks. These include the incentive to invest in next-generation architecture and the upgrading of existing loop plant, and the existence of intermodal competition. Due to the unique facts of this particular situation, Gemini notes that those "other considerations" weigh in its favor of unbundling the unique HFC network. The case for not unbundling local loop facilities rests on the resulting incentive for the ILEC to continue deployment of advanced facilities which does not exist here because the Telco has abandoned the HFC network. In order to "unleash the full potential" of the HFC network, it must be unbundled in order for Gemini to invest in the infrastructure and provide more innovative products and services to Connecticut consumers.[24]

Gemini argues that unbundling of the HFC network is consistent with the Telcom Act and promotes the FCC's goals and spurs investment in next-generation networks for the provision of advanced services to consumers. Gemini is seeking unbundling of the HFC network for the provision of voice-grade telephony services which are "qualifying services" for which network elements must be unbundled. Nevertheless, once the HFC network is unbundled and used for the provision of qualifying services, Gemini plans to provide advanced services to Connecticut consumers, including non-qualifying services and information services. Gemini claims that this is encouraged by the FCC in order to maximize the use of facilities and not waste a network element by refusing to allow it to be put to its maximum use.[25]

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[24] Id., pp. 5-10.
[25] Id., pp. 10 and 11.

Gemini also maintains that the TRO deals extensively with the subject of unbundling of local loops focusing on the unbundling of traditional network architectures and loops including traditional copper loops, fiber-to-the home (FTTH) and hybrid copper/fiber loops. In the opinion of Gemini, the TRO does not specifically address the unbundling of the HFC loop even though the FCC recognizes HFC as a form of local loop.

Moreover, Gemini claims that the FCC sought to achieve three main goals through its triennial review. In particular, the FCC sought to: (1) implement and enforce the Telcom Act's market-opening requirements; (2) apply unbundling with a recognition of the barriers faced by competitive entrants as well as the societal costs of unbundling; and (3) establish a regulatory foundation that creates an incentive for investment in advanced telecommunications infrastructure by both ILECs and competitive providers. Gemini asserts that the unbundling of the Telco's HFC network will satisfy these goals.[26]

Finally, Gemini states that if the FCC had addressed the HFC network in the TRO, it would likely have performed an impairment analysis similar to the one it performed for hybrid copper/fiber loops. Pursuant to this type of analysis, Gemini is entitled to the unbundling of the HFC network. Gemini contends that in reviewing whether to unbundle hybrid loops, the FCC evaluated three primary factors in an attempt to craft a balanced approach to determine the most appropriate unbundling regime for hybrid loops. These factors are the costs of unbundling, specifically focusing on whether refraining from unbundling hybrid loops would stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure; the effect of alternatives to mandating unbundled access to hybrid loops; and the state of intermodal competition.

Gemini claims that the first factor weighs in its favor because refusing to unbundle the HFC network would not cause investment in that network by the Telco. Since the Telco has already abandoned the HFC network, the only way to stimulate investment in that network is to unbundle it and allow Gemini to upgrade the infrastructure. Gemini also claims that the third factor supports the Petition because there are no competitive providers of voice-grade telephony serving mass market customers in Connecticut.

Relative to the effect of alternatives to mandating unbundled access to the loop, Gemini asserts that these factors would vary based on whether a competitive provider was seeking access for the provision of broadband or narrowband services. Gemini contends that the TRO requires the Department to analyze the issue in this proceeding pursuant to the rules governing the provision of narrowband services, because it is seeking to provide narrowband voice-grade telephony services. In particular, the FCC has determined that for narrowband services, the Telco must provide access to portions of the hybrid loop. The Telco must also provide an entire non-packetized transmission path capable of voice-grade services between the central office and customer's premises. Consequently, for hybrid loops, competitive providers are entitled to the non-fiber feeder portion of the loop plant, the non-fiber distribution portion of the loop plant, the attached digital line carrier system and any other attached electronics used to

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[26] Id., pp. 11-15.

provide a voice-grade transmission path between the customer's premises and the central office. In the opinion of Gemini, it is entitled to similar unbundled features, functions and capabilities.[27]

B. THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

The Telco states that Gemini bears the burden to prove that the Company's coaxial distribution facilities are subject to unbundling. In order to make a determination of whether specific network elements need to be unbundled, the Telco contends that the Department must find that: (1) the subject facilities are part of the Company's network; (2) the facilities are used, or dormant but of the type normally used, by the Telco (not merely capable, as Gemini contends) to provide telecommunications to Company customers; (3) it is technically feasible to unbundle the specific network elements identified by Gemini; (4) the Telco could provide nondiscriminatory access to such requested elements; (5) the requested elements are necessary to Gemini's provision of telecommunications services; and (6) Gemini would be impaired in the provision of those telecommunications services without the specific network elements. Without sufficient evidence to establish each element, the Petition must fail.[28]

According to the Telco, the Department has no authority to compel unbundling beyond that required by the FCC and that the Department has no independent state authority to order the Company to unbundle new network elements, because the Telcom Act specifically provides only the FCC with that authority. The Telco also states that the Supreme Court has supported the Company's contention that the Telcom Act and its unbundling requirements and regulations are a federal matter beyond the jurisdiction of the individual states. In the opinion of the Telco, the fact that the FCC has not previously ordered coaxial distribution facilities be unbundled, preempts any state commission decision to require unbundling of those facilities.

The Company suggests that in the absence of express authority delegated by the FCC, the Department has no authority to grant the Petition. The FCC also lacks the power to delegate to state commissions the responsibility for determining which categories of network elements must be unbundled. The Telco also claims that there is nothing in the Telcom Act to suggest that the FCC can delegate the decision of what network elements should be made available because that act expressly directs only the FCC.

The Company contends that if the FCC were to "delegate" the unbundling authority to the states, it would undermine the national policy and unlawfully abdicate its responsibility to provide substance to the necessary and impair requirements. According to the Company, nothing within the Telcom Act or the FCC's specific pronouncements suggest that it intended to delegate that authority to the states.[29]

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[27] Id., pp. 15-18.

[28] Telco Brief, pp. 6 and 7.

[29] Gemini notes that absent from the Telco's Brief is any discussion of the large number of FCC and judicial decisions that have interpreted Section 251(d)(3) of the Telcom Act as confirming the right of state legislatures and regulators to unbundle network elements. To date, more than 19 state public utility commissions have interpreted that statute as conferring independent unbundling rights on

Therefore, the Department does not have any explicit or implicit delegated authority to pursue additional unbundling of Telco assets.

The Telco further states that even if Gemini were correct that the Department's authority to unbundle the HFC network did not derive from the Telcom Act, state statutes require the Department to act in a manner that is consistent with federal law. Moreover, the Connecticut Supreme Court specifically found that the Department's ability to order unbundling is limited by the Telcom Act. Therefore, the Telco cannot be compelled to unbundle its facilities in a manner that is different from federal law, particularly where Gemini demands that non-telecommunications facilities be unbundled.[30]

The Telco maintains that the Department cannot assert jurisdiction over its coaxial distribution facilities and order that they be unbundled because they are not part of the Company's network. The Telco disagrees with Gemini's reliance on Conn. Gen. Stat. §16-247b(a) as statutory authority because the Department may only unbundle a telephone company's network used to provide telecommunications. The Telco asserts that the coaxial distribution facilities are not part of the Company's network and that they were never used nor are they the type routinely used by the Telco to provide telecommunications services to the public. Because the coaxial distribution facilities are not useful for telecommunications, the Company has removed and continues to dispose of them as conditions dictate.

The Telco also asserts that it would take substantial investments in equipment and maintenance to make the existing coaxial distribution facilities a workable network and that the Department cannot compel the Company to reactivate and maintain a second network for Gemini's use.[31] Additionally, the Telco claims that the reason it abandoned HFC was because it could not economically support two networks. The Telco asserts that Gemini ignores the fact that no operational support systems (OSS) exist to support HFC for telephony. Specifically, there is no ordering, provisioning, maintenance, repair or billing system deployed to support Gemini's request for network elements on the coaxial distribution facilities. The Telco contends that all of these costs would have to be borne by Gemini. The Telco also states that it is not aware of any vendor that has developed such an OSS. Moreover, such a request is contrary to the holding in Iowa Utilities invalidating the FCC's "superior quality" rules, which had directed incumbent LECs, upon request, to provide CLECs with access to interconnection and UNEs at levels of quality superior to the levels the ILEC provided such services to itself. Therefore, if the coaxial distribution facilities are not part of the Company's network, they cannot be subject to federal or state unbundling rules.[32]

The Telco further maintains that its non-regulated facilities are not subject to the Department's jurisdiction. In the opinion of the Company, no provision in the Telcom

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states. According to Gemini, the actions of those states have been upheld by the courts. Gemini Reply Brief, p. 2.

[30] Telco Brief, pp. 7-10.

[31] Gemini disagrees; it has requested that it be allowed to exercise its rights pursuant to state and federal law to lease the HFC network at TSLRIC rates. Gemini Reply Brief, p. 7.

[32] Telco Brief, pp. 10-12.

Act or state statutes provides the Department with jurisdiction to unbundle the Telco's non-telecommunications assets. The Company contends that when the Department granted SPV's application to relinquish its franchise, it expressly recognized the limits of its jurisdiction with respect to the Telco's assets. In citing Conn. Gen. Stat. §16-43, the Telco notes that the Department is permitted to review and approve Company initiated transactions and only if they involve property essential to its franchise or useful in the performance of its duty to the public. According to the Telco, it never used the coaxial distribution facilities to provide telecommunications services to its customers; and therefore, they cannot be considered essential to the Company's franchise.[33] Accordingly, the Department has no authority to compel the Telco to unbundle those portions of the HFC facilities that it previously recognized were not used to provide telecommunications, including those sought by Gemini.[34]

Additionally, the Telco maintains that the coaxial distribution facilities are not subject to unbundling because they cannot now, without substantial upgrades, be used to provide telecommunications. The Telco asserts that it never equipped any of its coaxial distribution facilities with equipment to permit the provision of telecommunications services to the public. In the opinion of the Company, the Telcom Act and Connecticut law support the Telco's position that the Department may only unbundle portions of the network that are used for telecommunications purposes. The requirement in §251(c)(3) of the Telcom Act to provide network elements is limited by the definition of network element as defined in §153(29) of the Telcom Act.[35]

The Company further claims that applicable federal and state statutes only authorize unbundling of its network and facilities used by the Telco to provide or provision telecommunications service to its customers; not, any facility that is capable of being used to provide telecommunications. According to the Telco, the FCC clarified this point in its Local Competition Order. Since the distribution facilities were not used by the Telco to provide its own telecommunications services, the Department lacks the authority to compel the Company or its shareholders to take any action.[36]

The Telco contends that while Phase I of this proceeding focuses on the legal issue of whether the coaxial distribution facilities must be unbundled, that is not the only legal issue which must be determined. The Company asserts that even if the coaxial distribution facilities are subject to Department jurisdiction, Section 251(d)(2) of the

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[33] Gemini argues that none of this is relevant because ratepayers funded the design and construction of the HFC network as an indivisible, fully integrated network to be used for both telecommunications and cable television purposes. Gemini also argues that it is not whether the HFC network is used and useful for ratemaking purposes, but whether the HFC network is capable of being used. In the opinion of Gemini, the HFC network was built to serve both functions and now cannot be restricted to only one function for the Telco's convenience. Gemini Reply Brief, p. 3.

[34] Gemini argues that the fact that the Department has ordered an asset removed from a regulated utility's books does not mean that the utility can never utilize that asset again nor preclude addition of that asset back onto the utility's regulated books of circumstances change. Id., p. 7.

[35] Section 153(29) of the Telcom Act defines a network element as a facility for equipment used in the provision of telecommunication service. The Telco notes that this definition was also adopted in Conn. Gen. Stat. §16-247a(b)(7) and that Conn. Gen. Stat. §16-247b(a) only permits the Department to unbundle Telco network elements that are used to provide telecommunications services. Telco Brief, pp. 10 and 11.

[36] Telco Brief, pp. 13-20.

Telcom Act requires the consideration of whether the network element is necessary and whether the failure to allow access would impair Gemini's ability to provide the services it seeks to offer. The Telco claims that the FCC specifically held in 47 C.F.R. §51.317(d) that, the states must apply the standards set forth in 47 C.F.R. §51.317 as to whether the requested network element meets the necessary and impair requirements of §251(d)(2) of the Telcom Act. The Telco also states that the Connecticut Supreme Court specifically found that the Department's authority to order unbundling is limited by the requirements of §251(d)(3) of the Telcom Act. Therefore, regardless of whether federal or state law is implicated, Gemini is bound by the necessary and impair standard under either scenario.

In addition, the Company contends that Gemini deprived the Telco and the Department of the basic information necessary to conduct this inquiry. In particular, Gemini failed to demonstrate that access to the requested UNEs is necessary for it to provide telecommunications services or that it would be impaired in the provision of telecommunications services without such access. The Telco claims that the only information Gemini provided regarding its perceived impairment was its assertions about how its business plan was based on an HFC facilities' architecture and that its network cannot use the Company's copper-based network. The Telco also disagrees with Gemini's argument that if it were required to use the Company's existing network, Gemini would be forced to abandon its facilities-based business plan. According to the Telco, such an argument runs counter to current unbundling rules because they only require the Company to unbundle network elements from its existing telecommunications network. The rules do not require the Telco to modify its network or build or maintain additional facilities of a type not used or useful for the Telco's provision of its telecommunications services to meet the specific business plan of a given carrier.

Further, the Telco maintains that Gemini employs an efficiency argument in an effort to establish impairment that is irrelevant to the necessary and impair standard for several reasons. First, the Telco has existing UNEs throughout Connecticut that Gemini could purchase, obviating the need to build a duplicative network. Second, requiring the Telco to rebuild and maintain the duplicative coaxial network would simply shift the burden to the Company, rather than Gemini. Finally, Gemini was offered the option of purchasing the coaxial distribution facilities outright, which it declined.

Lastly, the Telco disagrees with the Gemini argument that more unbundling is generally good for competition and that the Company should unbundle its coaxial distribution facilities. The Telco notes that the Court of Appeals rejected this argument and an impairment analysis that turns on what the CLEC seeks to offer to the exclusion of what alternatives are already available. The Company also notes that the FCC has recently determined in the TRO that CLECs cannot meet the impair standard when seeking to unbundle overbuild broadband facilities where narrowband facilities remain available. According to the Telco, while the technologies may be different, the impairment analysis is the same for the Company's overbuild coaxial distribution facilities. Therefore, even if the coaxial distribution facilities were used by the Telco to provide telecommunications, the Company cannot be required to unbundle those facilities because there is no impairment, as long as the Telco continues to make UNEs available on the Company's copper network. The Telco concludes that Gemini could

never prove that its request to unbundle such facilities would meet the necessary and impair standard of §251(d)(2) of the Telcom Act because the Telco already provides access to its network and end users through existing UNEs.[37]

In its written comments filed in response to the Reopened Notice, the Telco contends that the FCC has explicitly rejected the impairment argument presented by Gemini in this proceeding as the D.C. Circuit had directed in USTA. According to the Telco, the FCC reasoned that such an approach could give some carriers access to elements but not to others and that a carrier or business plan-specific approach would be administratively unworkable. The Telco also states that the FCC concluded that it could not order unbundling merely because certain carriers with specific business plans could be impaired. Therefore, based on the TRO, the Telco concludes that Gemini's proposed approach to unbundling is inappropriate and, as a matter of law, cannot be employed to establish impairment.[38]

In response to Gemini's claim that this docket is about obtaining unbundled access to a local loop, the Company argues that the TRO specifically limits incumbents' local loop unbundling obligations for the deployment of broadband services to the existing copper-based legacy facilities. In particular, the FCC has required that ILECs only make available for the mass market, unbundled access to 2-wire and 4-wire analog voice-grade copper loops and subloops. In addition, the FCC found that ILECs need only provide unbundled access to local copper wire loops because they are only required to provide a complete copper-based transmission path between its central office and the customer premises. The Telco notes that while the FCC required ILECs to provide local copper loops conditioned for xDSL services, it also determined that they are no longer required to make available the HFPL as a UNE. That is, the FCC limited incumbents' unbundling obligations with respect to the deployment of broadband facilities, and the Telco's coaxial distribution facilities do not fall within the FCC's definition of a loop or subloop that is required to be unbundled.

The Telco also notes that the FCC declined to require ILECs to provide unbundled access to their hybrid loops for the provision of broadband services. The FCC also determined that ILECs were not required to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market, including any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Accordingly, the Telco is not required to make available unbundled access to the packetized bandwidth of hybrid loops for the deployment of broadband services because CLECs are not impaired in their ability to provide broadband services as long as the incumbent offers unbundled access to conditioned, stand-alone copper loops. Based on Gemini's request to unbundle the coaxial distribution facilities, it is the Telco's opinion that the FCC has precluded any finding of impairment. The Telco also claims that Gemini's arguments that the Telco should be required to provide unbundled access to such coaxial distribution facilities are in direct conflict with the FCC's reasoning within its TRO.

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[37] Id., pp. 20-24.

[38] Telco September 12, 2003 Written Comments, pp. 4 and 5.

Regarding hybrid loops, the Telco states that the FCC found that an ILEC's only unbundling obligation was to provide unbundled access to a narrowband pathway capable of voice-grade service between the central office and the customer's premises using TDM technology. The FCC also found that the ILEC, at its option, could meet this unbundling obligation by making available unbundled access to a copper homerun. In the opinion of the Telco, the FCC reasoned that this was appropriate, because there is substantial intermodal competition for broadband services. Consequently, the Telco is not required to unbundle its coaxial distribution facilities as "loop" facilities because such a requirement would directly conflict with the FCC's findings and rationale.[39]

Moreover, the Telco maintains that the FCC further eroded the Petition by requiring that a CLEC may only access UNE(s) for the purpose of providing a qualifying service. Specifically, carriers requesting access to UNEs cannot qualify for UNEs if they only provide information services. For each UNE requested, the CLEC must provide a qualifying service on a common carrier basis. Relative to the Petition, the Telco asserts that Gemini's unbundling request must be rejected because it does not intend to use the coaxial distribution facilities to provide a qualifying service. According to the Telco, its coaxial distribution facilities do not support any qualifying telecommunications service without extensive retrofitting which is not required by the Telcom Act or the TRO, and therefore, they cannot be the subject of unbundling.[40]

Further, the Telco claims that the FCC made multiple factual findings in the TRO regarding the nature and extent of competition within the broadband market that directly negate Gemini's claim that there is insufficient competition for broadband services and that the Telco, along with cable companies, exercise too much power in this market. In the opinion of the Telco, Gemini's argument directly contradicts the FCC's findings that the broadband market is not only competitive but that cable modems dominate the broadband market. The Telco states that the FCC has, with one exception, refused to unbundle the HFPL, packet switching functionalities/bandwidth and FTTH loops because the broadband market is already competitive and that less regulation and unbundling will further the Telcom Act's and FCC's goals to spur the deployment of advanced telecommunications service capabilities.

The Telco also states that the FCC has found that ILECs are only required to make available unbundled access to 2-wire and 4-wire copper analog voice-grade loops (and to condition such loops) upon request by a CLEC for the deployment of xDSL-based services, along with the ILEC's traditional TDM-based loops such as DS1s and DS3s, even where the ILEC has already deployed an overbuild hybrid network. Finally, because the market for broadband service is highly competitive, the FCC has held that carriers cannot be impaired without access to ILEC facilities, as a matter of federal law.[41]

Lastly, the Telco maintains that the FCC confirmed that the Department can only order unbundling of a network element that is actually part of an incumbent's network.

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[39] Id., pp. 5-9.
[40] Id., pp. 9-11.
[41] Id., pp. 11-13.

Therefore, the Department may only require the Telco to unbundle facilities in its network which constitute "network elements," (i.e., those elements that are a part of the Telco's network). The Telco reiterates that its remaining coaxial distribution facilities are not part of the Telco's network and thus cannot be required to be unbundled.[42]

C. OFFICE OF CONSUMER COUNSEL

The OCC argues that the Telco's HFC facilities constitute UNEs and as such must be tariffed and offered on an element by element basis for lease at TSLRIC pricing. The OCC notes that I-SNET included statewide outside plant modernization utilizing HFC and switch upgrades. According to the OCC, I-SNET was described as a full service network that could provide a full suite of voice, data and video services. The OCC also claims that the stated goal of that network rebuild was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. Therefore, the OCC concludes that the HFC network was planned and designed to directly serve both telephony voice customers and to provide transport for video services.

Additionally, the OCC contends that the Department has been consistently forthright that the Telco consider itself "encouraged" if not legally bound to fully utilize this plant rather than merely storing it for an unspecified future use. The OCC cites to the SPV Relinquishment Decision,[43] where the Department held that should the Telco not lease the HFC network elements, "aggrieved" competitors should initiate a docket such as this to resolve the issue.

The OCC maintains that this docket requires the Department to determine, pursuant to state law, that the HFC network elements are subject to unbundling, (i.e., whether the Telco has an obligation as an ILEC to make existing facilities available to competitors in a nondiscriminatory manner). While noting the Department's responsibility to resolve whether the HFC network is subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a), the OCC states that such a determination will initiate an inquiry governed by federal law promulgated under 47 U.S.C. § 252. According to the OCC, the FCC has adopted rules and policies designed to make UNEs available to authorized telecommunications carriers such as Gemini with extensive rules concerning good faith negotiating conduct, non-discrimination, and freedom for the lessee to combine as they see fit. Accordingly, the OCC argues that the Telco must lease UNEs at TSLRIC prices.

The OCC disagrees with the Telco that the HFC network is not subject to unbundling because it is not currently used for telecommunications services. In the opinion of the OCC, it is the capability of a network that determines whether it is subject to treatment as a UNE. Further, numerous court cases support this conclusion, highlighting the opportunity for an ILEC to avoid the legal requirement of the unbundling

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[42] Id., pp. 13-15.

[43] Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity, Decision, dated March 14, 2001 (Relinquishment Decision).

and leasing of network elements by simply taking certain equipment out of service or discontinuing a specific service. The OCC argues that the inquiry in this proceeding must determine whether the facilities can be used by a potential competitor to provide telephone service to consumers, not the current use of them by the ILEC.

The OCC also disagrees with the Telco claim that the HFC network was only used for cable television services, is not a telecommunications network and thus is not capable of being unbundled. The OCC notes that the HFC network was designed to replace the existing twisted-pair copper telecommunications network, coincidentally providing the Telco with the possibility of delivering cable television services. The ancillary use of the HFC network by the Telco's cable television subsidiary, cannot be used to prevent unbundling of telecommunications facilities.[44]

Moreover, the HFC network represents a unique opportunity for sharing infrastructure to mutual advantage for the benefit of consumers. The OCC argues that for the Department to issue a ruling that portions of the Telco's HFC plant constitute UNEs, it will need to know what HFC plant currently exists, the component elements of that plant, how the plant is capable of being used, and how it constitutes a UNE. According to the OCC, the Telco has been less than forthcoming in providing that information and that the Company is in a superior position to know the current status of the HFC network in terms of inventory and capacity.

Of greater concern to the OCC however, is the Telco's claim that it has no records and no way of determining, other than a manual audit of the system, what elements of the HFC network plant remain and the condition or operability of that infrastructure. As a public service company, the Telco has an obligation to maintain adequate plant records and inventories. In the opinion of the OCC, it is incumbent upon the Department to hold the Telco responsible for its failure to adequately maintain records of existing plant. Accordingly, the OCC recommends that the Department establish a reasonable audit schedule to commence immediately, at the Telco's expense, should the Company continue to insist that it lacks precise knowledge or records detailing existing plant.[45]

In comments filed in response to the Reopened Notice, the OCC states that the intent of the TRO is to promote unbundling of legacy facilities/services while achieving limited unbundling of next-generation elements to promote future investments in broadband. The result is that the Department is presented with the opportunity to unbundle a unique HFC network built and currently owned by an ILEC.

The OCC claims that the TRO compels ILECs to continue to provide unbundled access to a voice grade equivalent channel and high-capacity loops using TDM technology features, functions, and capabilities of their hybrid loops, including DS1 and DS3. This requirement forms a central feature of the FCC's overall public policy resulting from its examination of mass markets loop access and differentiated among copper loops, hybrid loops, and FTTH loops, particularly in terms of the types of services offered over these facilities. This policy provides CLECs with the opportunity to

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[44] OCC Brief, pp. 2-7.
[45] Id., pp. 8-13.

continue providing both traditional narrowband services as well as high-capacity services like DS1 and DS3 circuits.

The OCC also claims that the TRO's public policies will be fulfilled by continuing the unbundling of legacy copper and hybrid loop facilities for narrowband functions, coupled with the more limited unbundling of next-generation fiber-based networks, in an attempt to encourage investment in these new networks. In addition to requiring unbundling for narrowband service with hybrid loops, unbundling of the Telco's HFC network for the narrowband uses will not deter the deployment of additional broadband in this state. The OCC states that releasing the Telco from the requirement that it unbundle its HFC network will not spur the Company to upgrade that network for broadband use. Rather, unbundling the Telco's HFC network will force further investment by the Company and others since Gemini has already demonstrated the will and ability to build an innovative network.

Further, the OCC is not convinced that intermodal competition is a worthy goal for introducing competition in the telecommunications market since thus far it has only displayed the qualities of an economic duopoly. The Petition provides an approach to advancing competition by upgrading a new platform in the architecture of telecommunications in this state.

The OCC concludes that the FCC has determined that distinguishing between "legacy" technology and "newer" technology, rather than transmission speeds, bandwidth, or some other factor, is practical because the technical characteristics of packet-switched equipment versus TDM-based equipment are well known and understood in the industry. That policy clearly dictates that the Telco's HFC network is a UNE that the OCC urges the Department order be unbundled.[46] While noting the number of legal challenges to the TRO, the OCC maintains that narrowband use of an abandoned hybrid network, remains required by law whether the TRO stands, is stayed, or is ultimately rejected by the courts.[47]

The OCC also maintains that the TRO requires that, with regard to narrowband service, legacy loops consisting of all copper and also hybrid copper/fiber facilities (such as the Telco's HFC network) must continue to be provided on an unbundled basis for the provision of narrowband services. The OCC asserts that the TRO specifically requires ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. This policy provides CLECs with the opportunity to continue providing both traditional narrowband services and high-capacity services like DS1 and DS3 circuits.

Moreover, the OCC argues that the fiber elements of the HFC network have already been integrated into the trunking services the Telco provides itself and possibly leases to other providers. While noting the Telco claim that its HFC network was not used to provide telecommunications and not subject to unbundling, the OCC contends that the record demonstrates that telecommunications was the primary goal and use of the HFC network. In short, the HFC network provided narrowband (and possibly

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[46] OCC September 12, 2003 Written Comments, pp. 4-8.
[47] Id., p. 10.

broadband) loop service for the Telco as an integral element of the public switched telephone network and, to the extent it has survived, it is still capable of doing so. The OCC concludes that the Telco's HFC network is a UNE that must be leased to competitors on a non-discriminatory basis and subject to TSLRIC-based pricing pursuant to the TRO and existing state law.[48]

The OCC also states that performing the revised impairment analysis outlined in the TRO leads to the conclusion that Gemini would be impaired by lack of access to the HFC network. Therefore, the OCC recommends that the Department require that the network be unbundled under state law, with the additional support of the provisions of the TRO. In support of that recommendation, the OCC suggests that Gemini is "impaired" when lack of access to an ILEC network element poses a barrier to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic.

Additionally, the OCC states that the FCC determined that CLECs are impaired on a national basis without unbundled access to a transmission path when seeking to provide service to the mass market, although it also found as a policy matter that this impairment "at least partially diminishes with the increasing deployment of fiber." The OCC claims that the TRO defines operational and economic barriers as scale economies, sunk costs, first-mover advantages, and barriers within the control of the ILEC, specifically analyzing market-specific variations, including considerations of customer class, geography, and service.

Further, the OCC notes that the FCC has evaluated three primary factors to determine the most appropriate unbundling requirements for hybrid loops: (1) the cost of unbundling balanced against the statutory goals set forth in §706 of the Telcom Act; (2) the effect of available alternatives; and (3) the state of intermodal competition. The OCC suggests that the Department rely on an impairment analysis in this proceeding in terms of state and federal law. According to the OCC, Gemini is relying on state law to leverage a financially-beneficial access method (unbundled network elements) to utilize newer technologies or a better network architecture in order to produce additional revenue opportunities that should accrue from enhanced economies of scope. The OCC argues that Gemini has a legal right to access to the HFC network and that denial of that access constitutes impairment not permitted by law.[49]

Lastly, the OCC claims that the FCC has prohibited ILECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs provided to CLECs. Specifically, any ILEC practice, policy or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under §251(c)(3) of the Telcom Act to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions. The OCC states that while this provision may not have ex post facto effect which would require the rebuilding of the HFC network, it

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[48] Id., pp. 13-15.
[49] Id., pp. 15-18.

may operate as a stay on the continued destruction of the HFC network elements remaining in the Telco's plant and subject to this proceeding.[50]

D. OFFICE OF THE ATTORNEY GENERAL

The AG recommends that the Department reject the Telco's arguments that: (1) Gemini's petition is preempted under federal law; (2) the Department has no jurisdiction over the coaxial distribution facilities in Tier Three as they were not and are not used to provide telecommunications services and, therefore, are not subject to unbundling pursuant to § 251(c)(3) of the Telcom Act, Conn. Gen. Stat. § 247b(a), or any other federal or state law. The AG suggests that these arguments be rejected because the Petition is not preempted under federal law. To the contrary, the Telcom Act specifically provides that state regulatory commissions may impose access or interconnection obligations in addition to those imposed under federal law or by the FCC. According to the AG, the relevant inquiry is not whether the HFC plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. Finally, the AG argues that Gemini is not required to demonstrate that it would be impaired without access to the HFC plant because it is incorrect and would undermine the broad pro-competitive policies of the Telcom Act as well as Connecticut state statutes.[51]

The AG states that the Telco's first argument that federal law preempts state regulatory agencies from determining what category of network elements must be unbundled is incorrect because the Supreme Court has made clear that preemption analysis must begin with the presumption that Congress did not intend to supplant state law. It is also clear that the presumption against preemption must be applied not only to decide whether Congress intended federal legislation to have preemptive effect, but also the actual scope of any preemptive effect.

The AG maintains that the Department is not preempted under federal law from exercising its regulatory authority to unbundle network elements necessary for the provision of telecommunications services. The Telcom Act specifically provides that the FCC shall not proscribe or enforce any regulation that would preclude or preempt any order of a state commission establishing access or interconnections obligations of the ILEC. Contrary to the Telco's arguments, the Telcom Act states that the FCC shall not displace or preempt the Department's authority to impose interconnection or access requirements. In the opinion of the AG, the Department's unbundling of the Telco's HFC plant does not conflict with or frustrate the FCC regulations; rather, it promotes the policies underlying those regulations. Accordingly, the Telco's arguments that the Department's authority to unbundled network elements is preempted by federal law are without merit.[52]

Regarding the Telco's argument that the Department has no jurisdiction over the coaxial distribution facilities in Tier Three because they were not used to provide telecommunications services and not subject to unbundling, or any other federal or state

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[50] Id., pp. 18 and 19.
[51] AG Brief, pp. 2 and 3.
[52] Id., pp. 3-5.

law, the AG maintains that this argument is without merit and has been rejected by the FCC as well as by trial and appellate courts throughout the country. According to the AG, the relevant inquiry is not whether the plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. The AG asserts that the FCC specifically found that unused telecommunications plant was a network element subject to unbundling. Therefore, the AG recommends that the Department reject the Telco's arguments that the plant must be in use to be unbundled and tariffed. As the HFC plant is capable of being used for the provision of telecommunications services, the Telco must provide access to it in a nondiscriminatory manner.[53]

Lastly, the AG recommends that the Department reject the Telco's claim that Gemini must make a preliminary showing that each network element is necessary for its provision of each telecommunications service and that Gemini will be impaired in its provision of those services without access to each network element. The AG contends that the Telco's argument is an incorrect statement of the law and irrelevant to the issue of whether the Company must make its plant available as UNEs to all telecommunications providers on a nondiscriminatory basis. The AG claims that the Telco is wrong that Gemini must first demonstrate that the fiber is necessary for the provision of telecommunications services before the Company provides a description of the plant sought to be unbundled. Therefore, the AG recommends that the Department find that the Telco's HFC plant is subject to unbundling and tariffing as an UNE pursuant to Conn. Gen. Stat. § 16-247b(a) and order the Company to unbundle its HFC network and move to the pricing phase of this proceeding.[54]

IV. DEPARTMENT ANALYSIS

A. INTRODUCTION

Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing. As indicated above, this proceeding has been bifurcated to address the legal issues. However, before addressing those issues, a discussion of the Telco's I-SNET technology plan, which included the statewide modernization of its outside plant utilizing the HFC technology and switch upgrades, is appropriate.

B. HFC NETWORK HISTORY

On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department. The intent of I-SNET was to be a full service network that could provide a full suite of voice, data and video services.[55] The goal of I-

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[53] Id., pp. 5-7.

[54] Id., pp. 7 and 8.

[55] In Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement, the Southern New England Telecommunications Corporation (SNET) testified that it anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers. SNET also testified that I-SNET was "proved-in"

SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements. In support of I-SNET, the Company stated that the existing telecommunications infrastructure was a contemporary one, capable of providing high quality voice-oriented communications and a variety of existing data communications applications. However, as customer requirements and communications technologies evolved to support other modes of communication, and as industry changes introduced competition and imposed new open-access requirements, it was anticipated that new and varied communications requirements would be imposed on the infrastructure. These functional requirements were addressed by I-SNET and were expected to range from narrowband (for voice and "low-speed" data applications) to broadband (for video and "high-speed" data applications). According to the Company, I-SNET was necessary to meet these requirements and to support those communications services.[56]

As part of I-SNET, the Company was to deploy over 200,000 plant miles of broadband transmission media, comprised of optical fiber and coaxial cable. Statewide deployment of Synchronous Optical Network (SONET) interoffice transport systems, digital switching, Signaling System Number 7 (SS7), Advanced Intelligent Network (AIN) and Integrated Services Digital Network (ISDN) capabilities were also to occur by 1999 that would complement the Company's fiber and coaxial installation. The Company expected that the complete timeframe for this infrastructure deployment would span a time period beginning in 1994 and end in 2009.[57]

Additionally, as part of that plan, the Company's analog and digital switches were to form the backbone of its switching network.[58] During the 1994–1999 time frame, electronic aggregate was to evolve into a streamlined, all digital platform complemented by ISDN-based digital access, SS7 signaling and AIN call control. Further, broadband infrastructure deployment was to begin with: 1) the total migration of the interoffice transport network to a SONET-based digital broadband platform; 2) initial broadband switch deployment (for data and video applications) with AIN-like call control capability; and 3) full deployment of the broadband operations management platform. These activities were also to result in the retirement of: 1) the embedded base of analog switches and asynchronous interoffice transmission systems; 2) significant portions of the embedded base of the digital switching system; 3) asynchronous loop transmission systems; 4) copper loop plant; and 5) an associated variety of common and complementary systems and subsystems.

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based on telephony cost savings alone and that potential video revenues were incremental revenues to the cost savings the Company expected to realize. According to SNET, when conversion to the HFC network was complete, the Company expected that network operating costs would be significantly less per access line than with the twisted copper pair. August 25, 1999 Decision, Docket No. 99-04-02, p. 4.

[56] November 21, 1995 Decision, Docket No. 94-10-03, DPUC Investigation into the Southern New England Telephone Company's Intrastate Depreciation (Depreciation Proceeding), Table B, p. B.

[57] Id.

[58] The Telco's modernization of switches from analog to digital was completed in the fourth quarter of 2001. December 18, 2002 Decision in Docket No. 02-01-19, DPUC Annual Report to the General Assembly on the Status of Telecommunications in Connecticut, p. 15.

Moreover, during the 2000-2004 timeframe, broadband modernization was to continue resulting in expanded broadband access to 84% of Connecticut's access lines. The Company also intended to introduce multimedia (voice, data, video), optimized broadband switching systems in the network, that would leverage and further consolidate the Company's switching consolidation efforts that began in the 1994-1999 timeframe.[59]

Lastly, during the third and final stage, the 2005-2009 timeframe, it was anticipated that the I-SNET deployment would be completed. The Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers. The Company also anticipated at the completion of the I-SNET deployment period, that the existing embedded base of copper cable, circuit, switching, computing and associated common and complementary assets would be replaced and retired. During the I-SNET deployment timeframe, the Company's network infrastructure was also expected to evolve from the current 125 switching locations that was comprised of 145 switches to 41 switching locations containing approximately 50 switches. According to the Company, this consolidation would facilitate evolution to a unified, broadband, multi-media network based on SONET transport and Asynchronous Transfer Mode (ATM) switching as defined by the broadband-ISDN architecture.[60]

In the Depreciation Proceeding, the Department determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.[61] The Department also determined that the Company should be provided the necessary assurances that its commitments introduce, where practical, the latest technology available.[62] Accordingly, the Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.[63]

Furthermore, as part of the Company's approved Alternative Regulation Plan (Alt Reg Plan), the Telco proposed quality of service standards that were based on the Company's expected service performance and its deployment of I-SNET.[64] In the March 13, 1996 Decision in Docket No. 95-03-01, the Department determined that the Telco would, through the implementation of I-SNET, improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones. Also during Docket No. 95-03-01, the Telco testified that in the long term, the deployment of HFC facilities would provide various features that could detect and address service degradation before customers experience service problems. The

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[59] November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. C.

[60] Id.

[61] November 21, 1995 Decision, Docket No. 94-10-03, p. 19.

[62] Id.

[63] Id., pp. 19 and 20.

[64] See the March 13, 1996 Decision in Docket No. 95-03-01, Application of the Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation.

Telco claimed that these HFC facilities would have network surveillance and built-in diagnostic capabilities which could detect points of failure and allow the Company to take the necessary corrective action. Those facilities also possessed the ability to automatically schedule preventive maintenance to ensure service dependability. Consequently, the Telco expected to improve its service quality every year during the deployment of the I-SNET and the HFC network. Accordingly, as part of its approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.[65]

However, in November 1996, Lucent, the major manufacturer and supplier of HFC components, announced that it would no longer be an HFC vendor. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology. The Telco undertook its own HFC review and ultimately decided to continue to deploy the HFC technology. Additionally, in February 1997, the National Electric Safety Code standards subcommittee denied the Company's request for a modification to allow placement of an independent power supply source as part of the fiber strand in the communications gain on telephone poles. The Telco claimed in Docket No. 99-04-02 that it had not found a cost-effective means of providing an independent power supply source and had used commercial power with battery back-up and portable generators. The Telco also stated that while such an arrangement was an acceptable approach for a very small number of customers, it could not be employed for broadscale use.[66]

At about the same time, many of the companies that had begun to deploy the HFC technology started to report that provision of telephone service over an HFC network was not technologically and economically viable. Beginning in 1997, telecommunications companies such as Pacific Bell (now a part of SBC Communications Corporation, Inc. (SBC)), NYNEX, Bell Atlantic, (currently a part of the Verizon Corporation) and Time Warner began to retreat from, and subsequently reject, HFC as a full service network solution. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.[67]

While no incumbent local telephone company, including the Telco, appears to offer telecommunications services over an HFC network, the clear purpose of I-SNET was to replace the Company's existing infrastructure so that it could provide voice, data and video services to its customers. If successfully deployed, I-SNET and the HFC network would have afforded the Company the ability to offer a full set of telecommunications services effectively and efficiently. The Department finds that in its I-SNET Plan, the Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be

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[65] Id., pp. 46 and 47.
[66] August 25, 1999 Decision, Docket No. 99-04-02, p. 5.
[67] Id.

used to support the offering of CATV services.[68] Rather, in accepting the I-SNET plan for purposes of a depreciation allowance and alternative regulation, the Department was led to believe that one network would support a full service offering package.[69]

Therefore, the Department concludes that I-SNET and the HFC network was to be used to support a host of telecommunications (including video) services. Based on the intended use of the HFC network, the Telco sought and was granted favorable regulatory treatment relative to depreciation and alternative regulation. The Department believes that had the HFC network been fully constructed in the manner as envisioned by the Telco in 1994, the Company would be well on its way in offering voice, data and video services over that network.[70] Additionally, it is because of the favorable treatment afforded the Telco, most notably in the Depreciation Proceeding and in Docket No. 95-03-01, that the Department will consider the Petition in light of the SPV Disposition Plan approved in Docket No. 00-08-14 and the recovery of the costs and expenses associated with that network's assets by the Company's shareholders.

C. FEDERAL AND STATE UNBUNDLING REQUIREMENTS

As a result of the Telcom Act and Connecticut Public Acts 94-83, An Act Implementing the Recommendations of the Telecommunications Task Force and 99-122, An Act Concerning Competition in the Telecommunications Industry,[71] certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition. The following analysis discusses in part, those obligations.

1. Telcom Act

Section 251(c)(2) of the Telcom Act imposes on ILECs:

> . . . the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and

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[68] See for example, the November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. D, wherein the Company provided the milestones for its network modernization.

[69] Table B, p. C.

[70] Id, p. D.

[71] Codified at Conn. Gen. Stat. §§16-247a-16-247r (Connecticut Statutes).

> conditions of the agreement and the requirements of this section and section 252.

In addition, §251(c)(3) of the Telcom Act requires ILECs to provide:

> . . . to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Further, §251(d)(2) of the Telcom Act required the FCC when determining what network elements should be unbundled to consider whether:

> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions. This means ILECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element.[72] The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. The FCC also indicated that just as §251(c)(2) of the Telcom Act requires interconnection at any technically feasible point, §251(c)(3) of the Telcom Act also requires access be provided at any technically feasible point. Therefore, pursuant to the terms of §§251(c)(2), 251(c)(3) and 251(c)(6) of the Telcom Act, an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.[73]

The FCC also addressed the "necessary and impair" standards outlined in §251(d) of the Telcom Act.[74] Specifically, the Commission recognized that §251(d)(2) of the Telcom Act provided the FCC with the ability to not require ILECs to provide access

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[72] CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order (FRO), August 8, 1996, ¶265.

[73] Id., ¶269.

[74] Id., ¶279.

to UNEs if for example, access to that particular element was not necessary.[75] In the opinion of the FCC, "necessary" meant that an element was a prerequisite for competition.[76] The FCC also recognized that §251(d)(2)(A) of the Telcom Act permitted the Commission and the states to require the unbundling of additional elements (beyond those identified by the FCC) unless the ILEC could prove to the state commission that the element was proprietary, or contained proprietary information that would be revealed if the element was provided on an unbundled basis; and a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network.[77] The FCC rejected the notion that ILECs need not provide proprietary elements if the requesting carriers could obtain the proprietary element from a source other than the incumbent. According to the FCC, requiring new entrants to unnecessarily duplicate parts of the ILEC's network would generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the Telcom Act.[78]

The FCC further refined its definition of "necessary" within the meaning of §251(d)(2)(A) of the Telcom Act, by considering the availability of alternative elements outside of the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer. The FCC also concluded that this "necessary" standard differed from the "impair" standard because a "necessary" element would, if withheld, prevent a carrier from offering service, while an element subject to the "impair" standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer.[79]

Relative to the impair standard, the FCC believed that an entrant's ability to offer a telecommunications service was diminished in value if the quality of the entrant's service, absent access to the requested element, declined and/or the cost of providing

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[75] Id.

[76] Id., ¶282.

[77] Id., ¶283.

[78] Id.

[79] FCC Docket No. 99-238, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Rel. November 5, 1999 (UNE Remand Order), ¶¶44 and 46. The UNE Remand Order was issued in response to the US Supreme Court's January 1999 decision that directed the FCC to reevaluate the unbundling obligations of §251 of the Telcom Act. According to the FCC, the Supreme Court's decision removed many of the uncertainties surrounding the requirements of §251 of the Telcom Act by upholding the majority of the Commission's rules implementing that section of the act, including its jurisdiction to implement §§251 and 252, the FCC's definitions of network elements, and its rule requiring ILECs to offer combinations of unbundled network elements that are already combined. The Supreme Court also directed the FCC to revise the standards under which the unbundling obligations of §251(c)(3) of the Telcom Act are determined. Specifically, the Supreme Court required the FCC to give some substance to the "necessary" and "impair" standards in §251(d)(2) of the Telcom Act, and to develop a limiting standard that was related to the goals of that act. In addition, as the FCC developed the "necessary" and "impair" standards, the Supreme Court required the Commission to consider the availability of alternative network elements outside the incumbent's network. Id., ¶1.

the service increased. Accordingly, the FCC interpreted this standard to require the Commission and the states, when evaluating unbundling requirements beyond those identified by the FCC, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the ILEC's network.[80] The FCC also declined to adopt the impairment standard advanced by most Bell Operating Companies (BOC) wherein they must provide UNEs only when the failure to do so would prevent a carrier from offering a service. Additionally, the FCC rejected the related interpretations that carriers are not impaired if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC.[81]

In its UNE Remand Order, the FCC concluded that the failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the ILEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminished a requesting carrier's ability to provide the services it sought to offer. The FCC also found that a materiality component requires that there be substantive differences between the alternative outside of the incumbent LEC's network and its network element that, collectively, "impair" a CLEC's ability to provide service within the meaning of §251(d)(2) of the Telcom Act. Consequently, the FCC concluded that where a competing LEC's "ability to offer a telecommunications service in a competitive manner is materially diminished in value without access to that element," the competitor's ability to provide its desired services would be impaired.[82]

Finally, the Department notes that §251(d)(3) of the Telcom Act provides the states with independent authority to require unbundling.[83] Specifically, §251(d)(3) of the Telcom Act states:

> PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section;

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[80] FRO, ¶285.

[81] Id., ¶286.

[82] UNE Remand Order, ¶51.

[83] The Department is perplexed by the Company's argument in this proceeding that "the Department has no independent state authority to order the Telco to unbundle new network elements." Telco Brief, pp. 7 and 8. The Department questions this statement in light of a filing made in US District Court, wherein the Telco argued that "state commissions such as the Department are permitted under federal law to expand the FCC's list of network elements that must be unbundled." See the July 3, 2001 Complaint for Declaratory and Injunctive Relief, Civil Action No. 301CV01261, The Southern New England Telephone Company, v. Donald W. Downes, et al in their official capacities as Commissioners of the Department of Public Utility Control, p. 6.

and
(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

This was reaffirmed by the FCC when it stated that §251(d)(3) of the Telcom Act grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of §251 of the Telcom Act and the national policy framework instituted in the UNE Remand Order.[84]

2. Connecticut Statutes

In addition to the authority granted in the Telcom Act, the Department possesses the authority to require the unbundling of the Telco's HFC network pursuant to Conn. Gen. Stat. §16-247b(a). That statute provides in part, that:

> On petition or its own motion, the department shall initiate a proceeding to unbundle the noncompetitive and emerging competitive functions of a telecommunications company's local telecommunications network that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

In addition, Conn. Gen. Stat. §16-247b(b) requires in part that:

> Each telephone company shall provide reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers. . . .The rates for interconnection and unbundled network elements and any combination thereof shall be based on their respective forward looking long-run incremental costs, and shall be consistent with the provisions of 47 USC 252(d).

Conn. Gen. Stat. §16-247b complements the Telcom Act and FCC orders by separately providing the Department with the authority to require the unbundling of network elements. Therefore, the Department is not limited, nor do the Connecticut Statutes restrict the Department from requiring the unbundling of network elements based on the various telecommunications services offered by the ILEC.

3. Triennial Review Order

The FCC has reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.[85] Citing to 47 U.S.C. §153(29),[86] the

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[84] UNE Remand Order, ¶154.
[85] TRO, ¶58.

FCC states that a network element includes features, functions and capabilities that are provided by means of such facility or equipment.[87] The FCC also states that:

> . . . the definition of a network element is ambiguous as to whether the facility must be *actually used by the incumbent LEC* in the provision of a telecommunications service or must be *capable of being used* by a requesting carrier in the provision of a telecommunications service regardless of whether the incumbent LEC is actually using the network element to provide a telecommunications service. We find that, taken together, the relevant statutory provisions and the purpose of the 1996 Act support requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.[88]

The FCC further states when defining a network element, that to interpret the definition of a "network element" so narrowly as to mean only facilities and equipment used by the ILEC, in the provision of a telecommunications service would be at odds with §251(d)(2) of the Telcom Act and the act's pro-competitive goals. Additionally, providing requesting carriers with access only to those facilities and equipment actually used by the ILEC would lead to such unreasonable results. Finally, the FCC notes that an alternative reading of that statute would allow ILECs to prevent competitors from making new and innovative uses of network elements simply because the ILEC has not yet offered a given service to consumers. The FCC concludes that such a result would stifle competitors' ability to innovate and could hinder deployment of telecommunications services.[89]

Relative to "qualifying services," the FCC has determined that in order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.[90] The FCC defines "qualifying" as those telecommunications services offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs. Those services include local exchange service, such as POTS and access services, such as xDSL and high capacity circuits.[91]

Moreover, the FCC finds that once a requesting carrier has obtained access to a UNE in order to provide qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.[92] The FCC concludes that allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying

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[86] 47 U.S.C. §153(29) defines a network element as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

[87] Id.

[88] TRO, ¶59.

[89] Id., ¶60.

[90] Id., ¶ 135.

[91] Id.

[92] Id., ¶143.

services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.[93]

The FCC again addressed the Necessary and Impair Standard. Specifically, the FCC determined that while the Telcom Act does not offer a definition of "impair," there are a number of possible definitions available for determining when impairment exists. The FCC cites as an example, *barriers to entry*, to examine whether competitors are prevented from entering a particular market.[94] According to the FCC, depending on the circumstances, barriers to entry can come from a variety of factors such as sunken costs, scale economies, scope economies, absolute cost advantages, capital requirements, first-mover advantages, strategic behavior by the incumbent, product differentiation, long-term contracts, and network externalities.[95]

4. Conclusion

a. Statutory Authority

The Telcom Act, Connecticut Statutes, FCC orders (specifically, the TRO) and court decisions provide the terms and conditions under which the Telco must provide access to UNEs or unbundle its telecommunications network to its competitors. The FCC has further refined those terms and conditions and developed a UNE list that identifies the minimum number of unbundled network elements that must be offered by the Telco to its competitors. The Telcom Act also provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC. The Connecticut Statutes have also provided the Department with the authority to require the unbundling of ILEC network elements.[96] In the opinion of the Department, unbundling of the Telco's HFC network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco).

This authority was recently reaffirmed by the FCC in the TRO.[97] In particular, the FCC noted that §251(d)(3) of the Telcom Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Telcom Act and its purposes or the Commission's implementing regulations. Conn. Gen. Stat. §16-247b is consistent with that act. The

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[93] Id., ¶146.

[94] Id., ¶74.

[95] Id., ¶75.

[96] While Conn. Gen. Stat. §16-247b(a) requires that network elements that are necessary for the provision of telecommunications services, as discussed below, Gemini will be at a definite competitive disadvantage if access to the Telco's HFC network is denied. Beginning with the differences in network performance afforded to Gemini through the use of HFC facilities versus that provided over copper, Gemini would be unable to meet its business plan or offering of end to end communications to its customers. Additionally, the interconnection of Gemini's existing HFC Network is only possible with the Telco's existing HFC Network and not with the Company's twisted pair copper loop network, thus providing the kind of interoperability and open networks envisioned by the Connecticut statutes. Gemini Response to Interrogatory TELCO-4.

[97] TRO, ¶191.

FCC also noted that many states have exercised their authority under state law to add network elements to the national list.[98] More importantly however was the FCC's disagreement with incumbent LECs (specifically, SBC, the Telco's parent) who argued that the states are preempted from regulating in this area as a matter of law. According to the FCC, if Congress had intended to preempt the field, Congress would not have included §251(d)(3) in the Telcom Act.[99]

b. Used and Useful vs. Capable of Being Used

The Telco argument proffered in this proceeding against permitting the unbundling of the HFC network (because it was not used in the provision of telecommunications service) has been addressed in the Appellate Court and in the UNE Remand Order[100] and the TRO. For example, this argument was rejected by the United States Court of Appeals for the Fourth Circuit. See AT&T Communications of Va., Inc. v. Bell Atlantic – Va., Inc., 197 F.3d 663, 672 (4th Cir. 1999). In that proceeding, Bell Atlantic claimed that its equipment must be in actual use, and not merely capable of being used in order to qualify as a network element. In its opinion, the Fourth Circuit rejected that argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" was broadly defined.

More importantly however was the FCC's determination that an element is subject to unbundling if it is already installed and called into service. Similar to the Fourth Circuit Court's finding noted above, the FCC, when addressing when a potential competitor is impaired without access to dedicated and shared transport, stated that:

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[98] Id.

[99] Id., ¶192 and fn. 609.

[100] The Telco and Gemini acknowledge that portions of the UNE Remand Order have been remanded to the FCC by the D.C. Circuit Court. (See USTA wherein the D.C. Circuit Court directed the FCC to re-examine certain issues pertaining to UNEs and one issue relating specifically to line sharing). The Telco also claims that the USTA order vacated the FCC's unbundling standards and without new standards, it would be difficult for the Department to justify that Gemini is impaired by its failure to gain access to the Company's coaxial distribution facilities. (Telco Reply Brief, p. 20). The Department disagrees with that conclusion. In USTA, the D.C. Circuit was very deliberate in vacating only that portion of the FCC's order pertaining to line sharing and not the necessary standard provided for in the UNE Remand Order.

> We reject incumbent LECs' arguments that because dark fiber is transport that is not currently "used" in the provision of a telecommunications service, within the meaning of section 153(29), it does not meet the statutory definition of a network element or the definition of interoffice transport. Rather, we agree with the Illinois Commission that the term "used in the provision of telecommunications service" in section 153(29) refers to network facilities or equipment that is "customarily employed for the purpose" of providing a telecommunications service. Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element.
>
> We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., unused copper wire stored in a spool in a warehouse). Defining such facilities as network elements would read the "used in the provision" language of section 153(29) too broadly. Dark fiber, however, is distinguishable from this situation in that it is physically connected to the incumbent's network and is easily called into service. Thus, as indicated above, we conclude that dark fiber falls within the statutory definition of a network element.[101]

The FCC's recent clarification of network elements relative to "used vs. capable of being used" analysis is instructive to this proceeding as well.[102] Specifically, the FCC requirement that unbundled access to network elements that are "capable of being used" be provided to competitors. In the instant case, the Telco HFC network has already been deployed and could be placed into service by Gemini. Gemini has committed, most recently in its September 26, 2003 Reply Comments, to providing voice-grade narrowband services, including POTS, over the HFC network.[103] In light of the TRO, the Department finds that the HFC network while actually not being used to provide telecommunications services, was constructed in part and intended by the Company to provide a full complement of voice data and video services. In the opinion of the Department, the capability existed for provision of those services and as such, the HFC network should be unbundled. The Department also finds that based on 47 U.S.C. 153(29) the HFC network meets the definition of a "network element," and therefore it must be unbundled. Accordingly, the Department is not persuaded by the Company's

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[101] UNE Remand Order, ¶¶327 and 328.

[102] TRO, ¶¶59 and 60.

[103] See also the September 28, 2001 Decision in Docket No. 01-06-22, wherein Gemini was authorized by the Department to offer retail facilities-based and resold local exchange telecommunications services throughout Connecticut. Specifically, Gemini has been permitted to offer local exchange flat rate, measured rate, operator access, residential custom and class features, basic business exchange services, intrastate toll, directory assistance, residential ancillary and operator services to business and residential customers throughout Connecticut. Docket No. 01-06-22 Decision, pp. 1 and 2.

argument that it is not required to make available unbundled access to these facilities because Gemini will only be offering broadband services. Gemini has committed to offering the FCC's qualifying telecommunications services over that network, and in accordance with the TRO, other services (e.g., broadband) may also be offered.

The FCC has also considered the effect of alternatives to mandating unbundled access to the hybrid loops of ILECs. Specifically, whether unbundled access to subloops, spare copper loops, and the nonpacketized portion of ILEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to an intrusive unbundling approach.[104] Relative to the Petition, Gemini has requested unbundled access to the coaxial portion of the loop and the electronics related to that plant.[105] The Telco HFC network and hybrid facilities differ from those addressed by the FCC in the TRO. In comparing the Petition for access to HFC network components to those considered by the FCC in the TRO, they appear to be analogous. That is, the hybrid loop components that the FCC has required be unbundled are equivalent to those in the HFC network that Gemini has sought access to in the Petition in support of its provision of narrowband services. Therefore, these components should be unbundled.

The Telco also argues that even if the Department had the additional authority to unbundle the Company's coaxial distribution facilities, such action would be inconsistent with or conflict with the TRO.[106] According to the Telco, the FCC conclusion regarding hybrid loops and an ILEC's unbundling obligations for a CLEC's deployment of broadband service supports the Telco's position that it cannot be obligated to unbundle those coaxial facilities.[107] The Department disagrees. The Telco's HFC network is unique. Additionally, while the TRO did not specifically address the network facilities that are the subject of this proceeding, the FCC crafted this order in part, to reflect the intent of the Congress and the Telcom Act. In particular, the recognition of market barriers to entry faced by new entrants as well as the societal costs of unbundling. Indeed, the FCC correctly established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long term benefit for all consumers.[108]

Connecticut has before it a competitive service provider that is willing to invest in the state's telecommunications infrastructure, a portion of which has been abandoned by the Telco. Gemini has not only committed to investing in that network, but has also committed to offering a full panoply of telecommunications services to consumers. In the opinion of the Department, access to the HFC network by Gemini will meet the Telcom Act and FCC pro-competitive goals (as well as those outlined in Conn. Gen. Stat. §16-247a) by providing for increased competition in the Connecticut local exchange service market. Unbundling of the HFC network will encourage the deployment of advanced facilities by Gemini as evidenced by its commitment to invest in that network.

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[104] TRO, ¶199.
[105] Gemini September 12, 2003 Written Comments, pp. 17 and 18.
[106] Telco September 26, 2003 Written Comments, pp. 22-26.
[107] Id., p. 23.
[108] TRO, ¶5.

Regarding the used and useful requirements of the Telcom Act and Connecticut Statutes, federal and state law require that Gemini be afforded access to the Telco's network and UNEs. Although the HFC network did not develop in the manner envisioned by the Company, it was intended to provide voice services, and therefore, capable of providing telecommunications services. If deployment of the I-SNET network had occurred as intended, the Company would have been well on its way to offering telecommunications services over the HFC network. The Telco's deployment of that network began prior to implementation of the Telcom Act and subsequent FCC orders and Connecticut Statutes, and as such, the Company would most likely have been required to permit competitors unbundled access to that network if it were fully functional today.

The Telco argues that the coaxial cable facilities at issue in this proceeding are not a network element that the Company is obligated to unbundle.[109] Citing the TRO, the Telco maintains that these facilities do not constitute a network element because they are neither a part of the Company's network nor capable of being used to provide a telecommunications service without significant modifications that go beyond those the FCC has required ILECs to make in the provision of UNEs.[110] The Telco also argues that the FCC declined to require incumbent LECs to provide unbundled access to their hybrid loops for the provision of broadband services. According to the Telco, the FCC found that ILECs are not required to unbundle their next generation network, packetized capability of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.[111]

The Department disagrees with the Telco for a number of reasons. First and foremost, the Department has already determined that the HFC network is a network element that should be unbundled. Secondly, the FCC has required incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed and does not include the construction of new wires. Additionally, the FCC has addressed loop facilities and deployment in the TRO. Specifically, the FCC has required that loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities. In the instant case, Gemini has committed to offering the FCC's qualifying services over facilities that have been abandoned by the Telco.[112] The FCC also required ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. According to the FCC, this would allow CLECs to continue to provide traditional narrowband services and high capacity services like DS1 and DS3 circuits.[113]

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[109] See the Telco's September 26, 2003 Reply Comments pp.13-18.

[110] Id., p. 13.

[111] Telco September 26, 2003 Reply Comments, pp. 23 and 24.

[112] Throughout the Company's September 26, 2003 Reply Comments, the Telco maintains that Gemini is prohibited from offering "broadband" services over its HFC network. (See for example, those comments, pp. 24, 25 (and fn. 63) and 26. The Department notes that the Company in these discussions fails to acknowledge Gemini's commitment and that the FCC has permitted the offering of such services which may be combined with broadband-type services in order to offer subscribers a full complement of telecommunications and information services. TRO, ¶¶143 and 146.

[113] Id., ¶199, fn. 627.

While the TRO does not address the unique circumstances of the HFC network, the FCC recognizes that its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because incumbent LECs have already made the most significant infrastructure investment, the FCC has sought to encourage both intramodal and intermodal carriers (in addition to ILECs) to enter the broadband mass market and make infrastructure investments in equipment. The FCC also expects that more innovative products and services will follow the deployment of new loop plant and associated equipment.[114] In light of the above, the Department reaffirms its conclusion that the HFC network should be unbundled.

As long as Gemini offers the FCC's qualifying services, the Telco's HFC network must be unbundled. Accordingly, the Telco's argument that facilities or network elements must be used for telecommunications services before they can be unbundled is hereby dismissed. Although the Telco's HFC network is currently in a state of disrepair, the Department expects that the Company will, as required by the TRO, take the necessary actions required to afford access to those facilities sought by its competitors. The Department also finds that Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services. Consequently the Telco's concern that the HFC network is not capable of providing telecommunications services without significant modification is also without merit.

c. Necessary and Impairment Standard

i. Is Access to the HFC Network Necessary?

The Telco argues that §251(d)(2) of the Telcom Act requires the consideration of whether a network element is necessary and whether the failure to allow access to that element would impair Gemini's ability to provide the services it seeks to offer.[115] The Telco further claims that the Department must determine that access to the facilities is necessary and that failure to provide access would impair the ability of the telecommunications carrier to provide the services it seeks to offer.[116] The Telco maintains that Gemini will not be impaired without access to the Company's HFC network nor can Gemini demonstrate that such access is required by §251(d)(2) of the Telcom Act.[117]

The Department disagrees. First, the FCC has determined that the "necessary standard" applies only to proprietary network elements. Additionally, the FCC adopted standards that aid in the determination of whether a network element is proprietary in nature. Specifically, the FCC determined that (footnotes omitted):

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[114] TRO, ¶244.
[115] Telco Brief, p. 20.
[116] Telco Reply Brief, p. 6.
[117] Id., pp. 20-24.

> We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such an investment is "proprietary in nature" within the meaning of section 251(d)(2)(A). This definition is consistent with the 1996 Act's policy of preserving the incumbent LECs' innovation incentives. It is also consistent with the Commission's conclusion, in the *Local Competition First Report and Order*, that in some instances it will be "necessary" for new entrants to obtain access to proprietary elements. Finally, our decision to define interests that are "proprietary in nature" along established intellectual property categories is consistent with the Department of Justice and Federal Trade Commission "Guidelines for the Licensing of Intellectual Property."[118]

The FCC reaffirmed this determination even though it had sought comment on whether to change that interpretation of "necessary" established in the UNE Remand Order. According to the FCC, it declined to make that change. The FCC states that the D.C. Circuit Court did not remand that issue back to the Commission, vacate the necessary standard nor did it instruct the FCC to consider it further.[119]

The Department does not believe that the "necessary standard" applies because, throughout this proceeding, the Company has argued that the HFC network has been abandoned,[120] and therefore, it is not proprietary. Nor has the Telco offered evidence meeting the criteria established in the UNE Remand Order.[121] Finally, relative to Conn. Gen. Stat. §16-247b(b), the Department finds that Gemini has presented significant evidence supporting its request that the HFC network be unbundled because it is necessary in the provision of the FCC's qualifying services. Specifically, the Telco HFC network offers Gemini an architecture that is more advanced and efficient than that of the Company's existing copper twisted pair. Gemini's access to the HFC network is also necessary because otherwise, it would be required to replicate an existing network, in direct conflict with Conn. Gen. Stat. §16-247a(5). Accordingly, the Department finds that the HFC Network is not subject to the "necessary standard," and meets the requirements of the Connecticut statutes.

ii. Impairment Standard

The FCC has concluded that the ILEC's failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, after taking into consideration the availability of alternative elements outside the incumbent's network, lack of access to that element diminishes a requesting

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[118] UNE Remand Order, ¶¶ 35 and 36.

[119] TRO, ¶171.

[120] See for example the Telco's January 21, 2003 Motion to Dismiss the Petition Filed by Gemini Networks CT, Inc. or, in the Alternative, Motion to Stay and/or Bifurcate Issues and Request for Procedural Order, p. 3.

[121] Specifically, the Company did not demonstrate that it has invested resources to develop proprietary information or network elements that are protected by patent, copyright or trade secret law. UNE Remand Order, ¶35.

carrier's ability to provide the services it seeks to offer.[122] The Department agrees with that conclusion. The Department also agrees with the FCC that in some residential and small business markets, the delay and costs associated with self-provisioning of a network element would preclude those competitors, or others, from assuming the risk of entry, unless those elements could be purchased from the incumbent.[123]

The FCC has identified a number of "barriers to entry" that could cause impairment to prospective competitors entering a market. In the opinion of the Department, these "barriers" go directly to the heart of the Petition, and satisfy the Telcom Act's impairment standard. In particular, the FCC has determined that a requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.[124] Relative to the instant case, Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network. Likewise, Gemini could be impaired economically if it were required to construct its own facilities.[125] Gemini also, in light of the TRO, experiences "first-mover advantage" barriers to entry. In this instance, Gemini is subjected to this barrier to entry because the Telco has experienced preferential access to rights-of-way, and possesses sunken capacity, and operational difficulties that have already been addressed when it constructed its HFC network as a monopolist.[126] Gemini also suffers from brand name preference (another first-mover advantage barrier) that the Telco currently enjoys.[127] Gemini would also be at a disadvantage in constructing its own network relative to the Telco because the Company was able to construct its HFC network with revenues generated from its monopoly customers.[128] A related issue are the costs that Gemini would incur in securing pole attachment licenses from the Telco for its own network in the event access to the Telco's HFC network is prohibited. Specifically, Gemini would unnecessarily experience make ready costs to either remove the Telco's existing facilities from its utility poles or replace those poles in their entirety to accommodate the addition of Gemini's facilities. In the opinion of the Department, the associated costs of this activity make market entry for Gemini uneconomical.

The Department also believes that the Telco's imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini

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[122] UNE Remand Order, ¶51.

[123] Id., ¶¶51, 54

[124] TRO, ¶84.

[125] The FCC has committed to considering business cases analyses if they provide evidence at a granular level concerning the ability of competitors economically to service the market without the UNE in question. Id., ¶99.

[126] Id., ¶89.

[127] Id.

[128] Related to this issue is the capital requirements barrier. In this case, some entrants are at a disadvantage when compared to the incumbents when raising large amounts of capital. TRO, fn. 248. The FCC cites as three possible reasons: entrants are a riskier investment, small entrants face higher transaction costs to raise funds, and the capital market is imperfect such that large firms have more market power to obtain loans at favorable rates. Id. In comparing the Telco (and its parent, SBC) to Gemini, the Department concludes that Gemini would likewise experience impairment from this barrier to entry.

has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business.[129] Gemini has implemented a technical plan that relies in part, and complements the Company's HFC network. To require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic.[130] Acceptance of the Company's other services as a means of offering its own services would require Gemini to construct a duplicate network and would also conflict with Conn. Gen. Stat. §16-247a(5)).

Gemini has expressed a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only the Telco's HFC network facilities (together with its requirement that it make those facilities available to its competitors) can satisfy those service needs. Gemini argues that the provision of telecommunications services over the HFC network is far superior in speed and consistency than over the existing copper network, based on its own experience operating its HFC network. The Department accepts that argument. While the Telco was unable to successfully utilize the HFC network, Gemini believes that it possesses a business plan that can make that network useful. For example, Gemini claims that its HFC-based architecture is faster and provides more consistent speeds for data transmission that do not occur over a twisted copper network.[131] Acceptance of the Telco's proposed alternative UNEs would, in the opinion of Gemini, force an architecture consisting of technologically inferior facilities.[132] Therefore the Department concludes that given the timing of the Petition, the type of Gemini's network architecture should not be considered a factor against requiring the unbundling of the Telco's HFC network.

Moreover, the Department finds that the FCC has declined to accept the SBC argument that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.[133] The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. The FCC also determined that such an approach would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price. Lastly, the FCC concluded that forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.[134] The Department finds that requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, would impair Gemini's entry into the market and its service offering to consumers and conflict with the TRO.

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[129] Gemini Response to Interrogatory TELCO-4, p. 2.
[130] TRO, ¶84.
[131] Gemini Response to Interrogatory TELCO-4, p. 2.
[132] Id.
[133] TRO, ¶102.
[134] Id.

D. HFC NETWORK DISPOSITION PLAN

The OCC protested the Telco's removal of portions of the HFC network without notice, subsequent to SPV's market withdrawal.[135] The OCC alleges that the Telco's removal of any HFC facilities is contrary to the Department's express directive that those assets be preserved to foster future competitive market entry by other service providers.[136] The OCC also objected to the Telco's claim that it cannot now offer access to HFC network elements because they have been removed or are so disjointed as to preclude connectivity via a lease arrangement.[137] Moreover, the OCC criticizes the Telco's record keeping practices associated with the removed HFC plant, as well as the Company's claim that the Department ceded jurisdiction over those assets by directing the Telco to assign associated costs to shareholders.[138]

In Docket No. 00-08-14, the Telco expressed a willingness to assist in developing a network transport arrangement for a potential cable provider, using all or portions of the HFC network, and the Department strongly encouraged the Telco to work with prospective video services providers to achieve that goal.[139] Nevertheless, to ensure that the Telco undertook no action with respect to disposition of any piece of the HFC network or assets that may be subject to a claim that the Company was thwarting competition, the Department ordered the Company to develop an organized disposition plan. The disposition plan was subsequently filed with and approved by the Department.[140]

From the time SPV ceased providing service in June 2001, miles of coaxial plant have lain idle. Since then, the Telco has removed coaxial distribution facilities and continues to dispose of them as conditions dictate. For example, during certain road construction projects, and in the case of plant damage and other situations, the Telco has removed and not replaced certain coaxial facilities because they were no longer in use. The Telco explains that if those coaxial distribution facilities were part of the Company's network, it would not be disposing of them.[141]

The Telco's removal of portions of the HFC network including coaxial plant since SPV's demise is not revelatory for the Department. The Telco's decision to not restore or replace unused coaxial plant damaged by storms, motor vehicle accidents, or otherwise abandoned when poles must be shifted is pragmatic and cost-effective. While the Department remains focused on fostering an environment conducive to market entry by a successor competitive cable operator, it would be unwise to require the Telco to continue to maintain and replace unused coaxial plant in perpetuity, or to require the Company to maintain and replace unused plant in the same manner in

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[135] OCC Brief, pp. 12 and 13.
[136] Id.
[137] Id., p. 12.
[138] Id., pp. 12 and 13.
[139] Relinquishment Decision, pp. 23 and 24.
[140] Filings dated May 1, 2001, and September 1, 2001, in response to Order Nos. 1 and 2 in Docket No. 00-08-14.
[141] Telco Brief, p. 11.

which it maintains and replaces its used plant. No evidence was presented in this proceeding that the Telco's removal of coaxial facilities was an attempt to thwart competition or impair network connectivity for a subsequent service provider. Additionally, removal of such unused plant typically does not invoke the same level of record keeping and network mapping that would be expected of the Company's energized network.

E. HFC NETWORK UNE INVENTORY

The Department has been hindered throughout this proceeding by the Telco and Gemini unwillingness to be entirely forthcoming in providing information regarding the location, configuration, status, use and need for the HFC facilities under review in this proceeding. The parties have also been unable to agree to the network elements that should be offered to Gemini because of their possible availability throughout the network.[142] Gemini has requested that it be presented with an inventory by the Company of the network elements that make up the HFC network.[143] However, the Telco does not possess, with any certainty, a listing of those elements that are presently residing in the network.[144] The Telco argues that the even if Gemini is correct in that the HFC network loops should be unbundled, the FCC has limited local loop unbundling obligations for the deployment of broadband services to the existing copper-based legacy facilities.[145]

The FCC goals as well as state goals relative to opening local markets to competing service providers will be satisfied by granting the Petition. Nevertheless, given the uncertainty of the HFC network elements that must be unbundled, the Department believes that further clarification on the part of Gemini is necessary. Since the Telco will be required to unbundle its HFC network into components that may be used by Gemini in the provision of its own services, an inventory of the existing network components is necessary to ensure that Gemini has before it a sufficient level of information to implement its business plan in an efficient and cost-effective manner. Accordingly, the Department will require the Telco to develop an inventory of its HFC network components in place as of the date of this Decision. The Telco should provide this inventory to Gemini no later than February 1, 2004.

The Department recognizes the Telco's responsibility in maintaining adequate plant records as well as its compliance with the SPV Disposition Plan. The Department also recognizes that the Telco will incur a cost of conducting and preparing this HFC network component inventory. That inventory would not be necessary had it not been for Gemini's request for access to those UNEs. Accordingly, the Department will require that Gemini and the Telco be equally responsible for the Company's cost of developing this inventory listing.

Once the inventory has been presented to Gemini, it should, for purposes of the Telco's cost analysis, provide the Company a detailed listing, including the location and

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[142] See for example the Gemini UNE Letter and the Telco's response; Tr. 4/8/03, p. 14.
[143] Tr. 4/8/03, p. 17.
[144] Id., pp. 16 and 17.
[145] Telco September 12, 2003 Written Comments, p. 5.

number of network components that it requires for the provision of its services. Gemini should provide the Telco with this list no later than April 1, 2004. At that time, the Telco should cost and price the UNEs in accordance with established Department requirements (i.e., TSLRIC). Once this list has been received by the Telco, the Company should conduct its TSLRIC analysis and provide the results of that study to Gemini and the Department no later than May 1, 2004.

Finally, the Department acknowledges that the Telco will incur certain necessary costs when maintaining the HFC network. As this network will be used by Gemini and perhaps other carriers, the Department does not believe that the Telco should be responsible for those costs. The Department will therefore permit the Company to incorporate the cost of maintaining those HFC network UNEs in its TSLRIC analysis as approved by the Department, to be recovered in the respective rates imposed on all carriers using that network in the provision of their own services. Pricing the UNEs in this manner will ensure that all carriers seeking access to the HFC network or a portion thereof, are responsible for the cost of its maintenance.

F. TELCO OPERATIONAL SUPPORT SYSTEMS

The Telco asserts that no OSS exists to support HFC for telephony. Operational support systems will provide for the ordering, provisioning, maintenance, repair and billing functions associated with the Telco's offering of HFC network UNEs. The Telco also states that it is not aware of any vendor that has developed such an OSS.[146] The Department is cognizant of the problems the Telco may experience in locating a vendor to develop an OSS for the Company's HFC network. Nevertheless, the Department will require the Telco to locate and engage a vendor that would be responsible in developing an HFC network OSS. The Department will require that the HFC network OSS be in place and operational no later than June 1, 2004.

Similar to the above, Gemini's request has required the Company to incur costs for a work effort that it would not have experienced had the Telco not been required to unbundle its HFC network. Therefore, the Department will require Gemini to be responsible for any costs associated with the development of the HFC network OSS. In the event that other carriers are provided unbundled access to the Telco's HFC network, they too, will be responsible for a portion of these costs, on a pro rata basis, and as a result, Gemini will be entitled to a refund of a portion of those costs.

V. FINDINGS OF FACT

1. Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing.

2. This proceeding has been bifurcated to address the legal issues during this phase.

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[146] Telco Brief, pp. 11 and 12.

3. On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department.

4. The intent of I-SNET was to be a full service network that would provide a full suite of voice, data and video services.

5. The goal of I-SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications.

6. I-SNET was intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements.

7. With the complete deployment of I-SNET, the Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers.

8. The Department has determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.

9. The Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.

10. The Department determined that the Telco would, through the implementation of I-SNET improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones.

11. As part of the Telco's approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.

12. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology; however, the Telco decided to continue to deploy the HFC technology.

13. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.

14. The Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be used to support the offering of CATV services in its I-SNET plan.

15. Based on the intended use of the HFC network, the Telco sought, and was granted favorable regulatory treatment relative to depreciation and alternative regulation.

16. As a result of the Telcom Act and Connecticut Public Acts 94-83 and 99-122, certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition in the state.

17. The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions.

18. The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service.

19. The FCC has determined that an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.

20. Section 251(d(3) of the Telcom Act provides the Department the independent authority it requires to direct the unbundling of ILEC network elements.

21. The FCC reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.

22. The purpose of the Telcom Act supports requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.

23. A network element is a facility or equipment used in the provision of a telecommunications service and includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

24. In order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.

25. Qualifying services are defined as those telecommunications services that are offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs (e.g., local exchange service, such as POTS and access services, such as xDSL and high capacity circuits).

26. Once a requesting carrier has obtained access to a UNE in order to provide a qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.

27. Allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.

28. Gemini has committed to offering qualifying telecommunications services over the HFC network.

29. Loops consisting of either all copper of hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities.

30. The FCC has recognized its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation.

31. Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services.

32. The "necessary standard" applies only to proprietary network elements.

33. An ILEC's failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, after taking into consideration the availability of alternative elements outside of the incumbent's network, lack of access to that element diminishes a requesting carrier's ability to provide its services.

34. The FCC has identified a number of "barriers to entry" that could cause impairment to prospective competitors entering a market.

35. A requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.

36. The FCC has declined to accept the SBC argument proffered during the Triennial Review Proceeding that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.

37. The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative because it would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price.

38. The FCC concluded that forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.

39. Requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, could impair Gemini's entry into the market and its service offering to customers and conflict with the TRO.

40. The Telco does not possess, with any certainty, a listing of those elements that are presently residing in the HFC network.

41. An inventory of the existing HFC network components is necessary to ensure that Gemini has before it a sufficient level of information to implement its business plan in an efficient and cost-effective manner.

42. The Telco will incur a cost of conducting and preparing the HFC network component inventory and would not be necessary had it not been for Gemini's request for access to those UNEs.

43. Operational support systems will provide for the ordering, provisioning, maintenance, repair and billing functions associated with the Telco's offering of HFC network UNEs.

44. No OSS currently exists to support HFC for telephony.

VI. CONCLUSION AND ORDERS

A. CONCLUSION

I-SNET was originally deployed to provide the Telco with a full complement of narrowband and broadband services (i.e., voice, data and video). In light of 47 U.S.C. §153(29), the Telco's HFC network meets the definition of a network element. Although the federal requirements relative to meeting the "necessary" standard do not apply, Gemini has satisfactorily demonstrated that access to the Telco's HFC network is necessary for the provision of its own services pursuant to Conn. Gen. Stat. §16-247b(b). Additionally, Gemini will be impaired as it will experience a number of barriers to entry as identified by the FCC in the TRO. Therefore, the Telco's HFC network is capable of providing telecommunications services and for purposes of this proceeding, is subject to the federal and state unbundling requirements. Unbundling that network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco). Accordingly, the Telco's HFC network should be unbundled in accordance with the orders listed below.

B. ORDERS

For the following Orders, please submit an original and 3 copies of the requested material, identified by Docket Number, Title and Order Number to the Executive Secretary.

1. No later than February 1, 2004, the Telco shall develop an inventory of its HFC network components in place as of the date of this Decision. The cost of which shall be equally shared between the Telco and Gemini.

2. No later than April 1, 2004, Gemini should provide the Telco with its listing of required network components.

3. The Telco shall conduct its TSLRIC analysis of the HFC network components identified by Gemini and provide the results of that study to Gemini and the Department no later than May 1, 2004.

4. The Telco shall locate and engage a vendor that would be responsible to develop an HFC network OSS. No later than June 1, 2004, the Telco shall implement a fully operational HFC network OSS.

DOCKET NO. 03-01-02 **PETITION OF GEMINI NETWORKS CT, INC. FOR A DECLARATORY RULING REGARDING THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED NETWORK ELEMENTS**

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date

Exhibit B

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

PETITION OF GEMINI NETWORKS CT, INC. FOR A DECLARATORY RULING REGARDING: THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED NETWORK ELEMENTS	:	DOCKET NO. 03-01-02
	:	NOVEMBER 26, 2003

WRITTEN EXCEPTIONS OF GEMINI NETWORKS CT, INC.

Gemini Networks CT, Inc. ("Gemini") appreciates the thoroughness of the Department's analysis of the issues presented in this proceeding. The Draft Decision issued on November 3, 2003 (the "Draft") contains a fair and accurate interpretation of the laws and policies underlying telecommunications deregulation. More importantly, it represents an important step toward providing Connecticut consumers with competitive communications services.

Gemini's exceptions to the Draft are limited to those aspects of the Draft that address issues that the Department determined in its letter ruling of February 10, 2003, would be handled in a second phase of this proceeding.[1] In that letter ruling, the Department stated, in response to a motion filed by SBC to bifurcate the proceeding, that inventory and cost-of-service issues would be handled in Phase Two, after critical legal issues had been resolved.

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[1] Letter Response of the Department to Motion Nos. 2 and 5, Feb. 10, 2003.

Because of the Department's decision to bifurcate this proceeding, the parties have not yet presented evidence concerning the manner in which an inventory of SBC's HFC Network should be taken or how best to determine the cost-of-service of those facilities. Nor have the parties considered whether an operations support system ("OSS") would be needed in connection with the use of facilities to be made available by SBC.[2] Therefore, Gemini respectfully suggests that the sections of the Draft dealing with inventory, cost-of-service and OSS be removed from the Draft. Because of the unusual nature of the HFC Network to be made available to Gemini and potentially to others as a result of this proceeding, traditional approaches to the determination of inventory, cost-of-service and OSS issues are unnecessary and inappropriate. Indeed, Gemini believes that if the approaches outlined in the Draft are followed without adjustment, the transaction costs associated with inventorying, costing and preparing the facilities for use are likely to be far too costly to permit Gemini, or any other third party, to make use of the facilities. In other words, the HFC Network will continue to lie fallow and competition will again be delayed. Gemini is prepared to present practical alternatives that can fully meet the needs of the parties and the Department that will be significantly less expensive and quicker to implement.

A full Phase Two proceeding may not be necessary to address these issues. Gemini is hopeful that at least some of the issues involving inventory, OSS and cost-of-service may be resolved through technical meetings with Department oversight.

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[2] Gemini does not seek to delay this proceeding any further or to delay access to the HFC Network; indeed, the reverse is true. Gemini appreciates the Department's attempt to resolve these issues in the Draft, thereby offering Gemini access to the HFC Network more expediently. Unfortunately, Gemini has not yet had an opportunity to present evidence on these issues.

Gemini requests that the Department provide in the final decision for such meetings, and that it further provide for the possibility of Phase Two hearings if the parties are unable to resolve these issues through technical meetings.

In the remainder of these exceptions, Gemini comments on the Draft's treatment of these issues and includes some of its suggestions to be considered during a technical meeting or Phase Two of this proceeding.

I. HFC Plant Inventory.

The Draft requires SBC, no later than February 1, 2004, to develop an inventory of its HFC network components in place as of the date of the Draft.[3] The Draft further requires SBC and Gemini to share equally the costs of developing such an inventory.[4]

A. An Inventory is Unnecessary.

Gemini believes that the development of an inventory as envisioned by the Draft is unnecessary. Gemini has determined that SBC maintains enough relevant information with respect to the HFC Network to suit Gemini's needs and to make a full inventory unnecessary.

In its compliance filing for Order No. 1, dated May 1, 2001, in the SPV Franchise Relinquishment docket,[5] SBC stated as follows:

> The Companies have engaged consultants from the firm Arthur Andersen ("AA") to assist in estimating the value of the assets contained in Major Asset Category 1, which is comprised of all the associated components in

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[3] Draft at 44.

[4] Id.

[5] Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity.

> the coaxial portion of the HFC Network. Telco provided AA a list of components of the entire HFC network and their associated original purchase and installation costs. Telco also identified separately the components of the coaxial portion of the HFC network that may be available for sale, lease or tariff and those components of the HFC network that will be re-used by SNET and are not available for disposition.[6]

Thus, a complete inventory of the existing plant was available as of May 1, 2001.

In this proceeding, SBC has claimed that the 2001 inventory is incomplete and unreliable, as SBC has systematically removed and disposed of portions of the HFC Network.[7] However, during SBC's appeal of the Department's order that it cease removing portions of the HFC Network pending the outcome of this docket,[8] SBC stated that it had actually removed very little of the network, in fact less than 200 miles out of 3,196 miles.[9] That court proceeding resulted in the execution and entry of a Stipulated Settlement to which the Department is a party. The Stipulated Settlement provides that SBC (1) shall retain the as-built plans of the HFC Network[10] and (2) shall keep detailed records of all portions of the HFC Network removed after the date of the

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[6] SBC Compliance Filing, Order No. 1, Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision Inc.'s Certificate of Public Convenience and Necessity, May 1, 2001 at 2 (emphasis added).

[7] Tr. 4/8/03 at 16-17. Gemini notes that the cited transcript is of the technical meeting convened by the Department in this docket at which no witnesses were present and no testimony was taken. Accordingly, such statements do not amount to evidence on which to base a determination of whether or not SBC possesses requisite inventory records.

[8] See generally The Southern New England Telephone Co. v. Dep't of Pub. Util. Control, CV-03-052-0409S, Judicial District of New Britain.

[9] In court on April 15, 2003, at which the Assistant Attorney Generals representing the Department were present, along with Department staff, SBC stated that 3,000 out of 3,196 miles of HFC plant remained. Thus, at that time only approximately six percent of the network had been removed.

[10] During this proceeding, Gemini engaged in numerous discovery exchanges with SBC concerning disclosure of information, including disclosure of the as-built plans. Unfortunately, the plans at issue, which Gemini's counsel expected to be the as-built plans for the HFC Network and which the Department ultimately ordered to be disclosed (see Department's Letter Ruling of June 3, 2003 regarding Motion 15; Department's Letter Ruling of July 16, 2003 clarifying Motion No. 15) turned out to be fiber strand maps and included no information with respect to the coaxial portions of the HFC Network. See CTTEL-34, Attachment B, "As Built Diagrams."

Stipulated Settlement. Accordingly, SBC has a detailed inventory of approximately 94% of the HFC Network.[11] Gemini expected to be provided with this information, including as-built plans for the coaxial portion of the HFC Network, during Phase Two of this proceeding.

An inventory of the HFC Network with only a six percent margin of error is more than sufficient for Gemini's needs and for the parties to determine a cost-of-service, as further discussed below. To the extent that Gemini requires more detailed information concerning missing portions of plant as it builds out its network, Gemini will require that information only at such time as it begins its upgrade and maintenance functions.

These issues were not addressed by Gemini in this proceeding as the Department deferred consideration of such issues to Phase Two. Gemini requests that the Department revise the Draft to permit consideration of these inventory issues, either through a technical meeting or through a Phase Two proceeding.

B. If an inventory is deemed necessary, SBC should pay for it and parameters should be put in place through a technical meeting.

As discussed above, Gemini believes that a full-scale inventory is unnecessary at this time and will result in a large waste of time and resources. However, all costs associated with any type of inventory should be paid by SBC. Requiring Gemini to foot the bill for any part of an inventory of SBC's assets that may potentially be used by

[11] Pursuant to the terms of the Stipulated Settlement, on November 19, 2003, Gemini's engineers inspected SBC's records with respect to plant that has been removed since the execution of the Stipulated Settlement. The amount removed since that date is negligible.

other parties has no grounding in law and places Gemini at a significant potential competitive disadvantage.[12]

The Department notes in the Draft that it "recognizes the Telco's responsibility in maintaining adequate plant records as well as its compliance with the SPV Disposition Plan."[13] However, the Draft does not require SBC to live up to this responsibility. Gemini submits that as a public service company obligated to provide service statewide, SBC has an obligation to maintain responsible inventory control. SBC has constructed thousands of miles of fiber and coaxial cable across a large part of Connecticut that is occupying space on the poles over which SBC is at least joint owner and, in almost all cases, pole custodian. It is unimportant whether the infrastructure is currently being used: SBC constructed the HFC Network and it remains in the public rights-of-way. In addition, ratepayers paid for it in large part. Accordingly, it should be physically accounted for by SBC.

The Department has conducted numerous dockets in recent years concerning less-than-professional provisioning in the public rights-of-way. Most recently, the Department has taken The Connecticut Light and Power Company to task for not maintaining an adequate and accurate inventory of its streetlight facilities.[14] All public

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[12] Gemini notes that other parties have expressed interest in use of the HFC Network, most notably Connecticut Telephone, which sought access to the HFC facilities in the Franchise Relinquishment Proceeding, Docket No. 00-08-14, and Cablevision Lightpath, which intervened in this proceeding. See Motion No. 16, June 20, 2003, granted by the Department on July 1, 2003. Those parties and other CLECs which may seek access have already ridden Gemini's coattails in this proceeding and have allowed Gemini to expend the resources necessary to have the HFC Network declared a UNE subject to unbundling. It would be unfair and unlawful to require Gemini to expend further resources to conduct an inventory of the plant for the benefit of its potential competitors.

[13] Draft at 44.

[14] See generally Docket Nos. 00-03-08, DPUC Review of The Connecticut Light and Power Company's Customer Service Policies and Charges and 03-07-02, Application of The Connecticut Light and Power Company to Amend its Rate Schedules.

service companies, in addition to any other entities utilizing the public rights-of-way, must be held responsible for plant that they construct in public rights-of-way, whether used and useful or not.[15]

II. TSLRIC COSS.

The Draft requires Gemini, after receiving the inventory from SBC, to provide SBC with a detailed listing of the location and number of network components required for Gemini to provide services to its customers.[16] SBC is then ordered to perform its total service long-run incremental cost ("TSLRIC") cost-of-service study ("COSS") based on the list received from Gemini.[17] Gemini submits that it is wholly unnecessary to "deconstruct" the HFC Network to make it available to third parties like Gemini as a UNE. Gemini further submits that to impose such a requirement would be in contradiction of state and federal law.

In order to be "unbundled" and made available for use, the HFC Network does not need to be dismembered piece by piece and then recombined in an artificial manner. This would make it more difficult and more expensive for Gemini to lease the HFC Network and provide service to Connecticut residents and small businesses. SBC did not impose such an artificial dismemberment of the HFC Network on its affiliate, SNET Personal Vision, Inc. ("SPV"),[18] and SBC does not engage in such artificial dismemberment of its network when leasing other UNEs, such as UNE-P, to CLECs.

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[15] At a minimum, to the extent that the Department orders that the costs of an inventory should be borne by Gemini or other parties, those costs should be included in the TSLRIC rates for lease of the HFC Network.

[16] Draft at 44-45.

[17] Draft at 45.

[18] SPV's lease rates were, on information and belief, based on an allocation of use, not an individual element basis.

The United States Supreme Court reinstated the FCC rule (previously voided by the Eighth Circuit) prohibiting an ILEC such as SBC from separating UNEs that are already combined in its network before leasing them to competitors.[19]

> Because this provision requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the Commission to find that the text does not command this conclusion. It forbids incumbents to sabotage network elements that *are* provided in discrete pieces, and thus assuredly contemplates that elements *may* be requested and provided in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form. Nor are we persuaded by the incumbents' insistence that the phrase "on an unbundled basis" in § 251(c)(3) means "physically separated." The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: "to give separate prices for equipment and supporting services." Webster's Ninth New Collegiate Dictionary 1283 (1988).
>
> The reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners and Brief for Federal Cross - Respondents 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

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[19] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 394-95 (1999) (citations in original).

Gemini has requested access to all coaxial portions of the HFC Network that currently exist in the field in whatever condition they currently exist. An artificial deconstruction and separation of the network components serves no end.

Traditional cost-of-service approaches may not be applicable with respect to the HFC Network. SBC has abandoned the HFC Network and has declared it to be of no value. Gemini is unaware of any instance in which the Department has used traditional cost-of-service methodology to value abandoned plant. By definition, abandoned plant has no value.

Gemini suggests that, at the conclusion of this phase of this proceeding, the Department convene a technical meeting between the parties to discuss how the cost-of-service should be performed. During this technical meeting, issues concerning the value of abandoned plant and the methodology to be used can be freely discussed. In the interim, Gemini respectfully requests that the Department require in its decision and orders in this proceeding that SBC immediately turn over to Gemini all cost information it has with respect to the HFC Network so that Gemini may adequately prepare for the technical meeting.

SBC formerly leased the coaxial portions of the HFC Network to its now-defunct affiliate, SNET Personal Vision, Inc. ("SPV"). Presumably, SBC performed a COSS to support its lease rates to SPV. Although this cost information is of limited value as the plant has been abandoned and written off, Gemini requests that the Department order SBC to release this cost information to Gemini.

Gemini has sought to utilize all existing coaxial portions of the HFC Network. Although a complete inventory and COSS is unnecessary, Gemini suggests that, once the appropriate COSS methodology has been determined, the Department require SBC to inventory and perform a TSLRIC COSS on one or two, five-to-ten mile samples of plant to be selected by Gemini. The sampling can be overseen by the Department's Utility Operations and Management Audit ("UOMA") unit. Based on the COSS and the samplings performed, SBC, Gemini and the Department can arrive at a cost-per-mile for lease of the HFC Network. As various sections of plant are upgraded and activated, Gemini will begin paying such cost-per-mile charges. If, as portions of the network are inspected for activation, Gemini discovers any portions of the plant that are more seriously degraded than the baseline or otherwise deviate significantly from the sampling, Gemini will alert SBC and the Department and an alternate course of action can be determined.

III. OSS.

The Draft requires SBC to find a vendor and develop an OSS for the HFC Network before Gemini can lease the HFC Network from SBC.[20] Gemini submits that a complicated OSS such as used for traditional copper-based telephony services is unnecessary. Additionally, there is no need for the kind of OSS which would have been needed by SBC in the event that SBC had fulfilled its plans to migrate its entire network to HFC.

As Gemini has repeatedly stated throughout this proceeding, Gemini's request is only for access to the HFC Network in whatever condition it presently exists. Gemini

[20] Draft at 45.

has no need for SBC to perform or provide any OSS functions for Gemini or its customers. Gemini has stated the need to upgrade and repair the existing portions of the HFC Network and has offered to maintain it. Gemini has also proposed to lease the entire network on a per-mile basis. This arrangement obviates the need for any complicated OSS.[21] Gemini can use its own OSS to handle ordering, provisioning, maintenance, repair and billing functions associated with the services it intends to provide over the HFC Network.

The HFC Network is unique, as the Draft recognizes. Traditional copper-based telephony architecture requires an OSS as orders are placed for separate twisted pairs. Each twisted pair ordered may provide a variety of different services, including POTS, vertical features, or data services. Moreover, it is generally SBC that performs the installations, disconnections and maintenance at the customer premises with respect to traditional leased access arrangements. It is thus understandable that a sophisticated OSS is necessary to track and bill for such multiple and diverse functions.

No such OSS is needed for the lease arrangement sought by Gemini. Gemini seeks to lease the coaxial cable containing the bandwidth of the HFC Network. Once a lease rate is established, preferably on a per-mile basis, SBC will have no further responsibility for the provisioning of service to customers. Gemini has its own work force to perform installations, disconnections and maintenance. Gemini will handle ordering, provisioning and servicing of its customers. In addition, Gemini will not be

[21] Allowing a monopoly like SBC to create an OSS and charge a prospective customer like Gemini for the cost is like leaving the fox in charge of the hen house. Undoubtedly, SBC will create a gold-plated OSS with a multitude of features that are totally useless to Gemini in a further effort to prevent the provision of competitive services by Gemini.

ordering thousands of twisted pairs, but rather bandwidth on one network on a per-mile basis. Bills could be rendered manually by SBC to Gemini in a relatively simple format for little cost.

Requiring Gemini to pay for an OSS developed and implemented by SBC in the form originally envisioned by SBC when it intended to migrate its entire copper network to HFC, at a potential cost of millions of dollars, would effectively prevent Gemini from entering the market, just as a ruling that the HFC Network is not a UNE would have. Gemini cannot commit to investing millions of dollars more than it already has invested and is planning to invest prior to activating the network and providing services to customers. Any SBC-controlled OSS is clearly unnecessary and will assure that there is no new competition in Connecticut of the kind envisioned by Gemini.

As a result of the Department's ruling of February 10, 2003, evidence and legal analysis with respect to these issues were to be deferred until Phase Two of the proceeding. However, Gemini is amenable to discussing these issues at a technical meeting to see if resolution can be reached without the need for a full Phase Two proceeding.

IV. Conclusion.

Gemini is pleased that the Department, after such a thorough analysis of the issues, correctly interpreted the law and ordered SBC to provide Gemini with unbundled access to the HFC Network.

However, for the reasons discussed above, Gemini believes that Sections IV.E. and F. of the Draft are unnecessary and potentially fatal to unbundling. In addition, the determinations made with respect to inventory, cost-of-service and OSS are premature in light of the Department's decision to bifurcate the proceeding. The parties must be heard on these issues prior to any ruling. Implementation of the inventory, cost-of-service and OSS provisions as currently contained in the Draft will defeat the purpose of this proceeding and effectively deny Gemini access to the HFC Network. Accordingly, Gemini respectfully requests that the Department strike those sections from the final decision in this docket and deal with the issues of inventory, cost-of-service and OSS either through a technical meeting or through Phase Two of this proceeding.

Respectfully submitted,

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